Petition

81-1715

No. ——

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company; NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In the opinion of petitioner Railway Labor Executives' Association (RLEA),* the following questions are presented by this petition:

1. Does a railroad reorganization court have the discretion to refuse to comply with the clear and unambiguous mandate of Section 17 of the Milwaukee Railroad Restructuring Act that a fair arrangement at least as protective of the interests of employees as that required under 49 U.S.C. § 11347 be imposed whenever the court authorizes any abandonment, sale, or transfer of the rail lines of a railroad in reorganization?

2. Do either the Due Process or Just Compensation clauses of the Fifth Amendment prohibit Congress from requiring an unreorganizable railroad to aid its employees bear the economic hardships caused by the withdrawal of that debtor's assets from railroad operations.

3. Does Section 17(b) of the Milwaukee Railroad Restructuring Act govern the sale or transfer of a debtor's railroad lines for continued rail operations to a newly-formed railroad in the course of liquidating a debtor under Section 77 of the Bankruptcy Act?

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* Petitioner Railway Labor Executives Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees. RLEA's member organizations are listed in Appendix H to this petition at 65a. While many parties have appeared before the reorganization court during the reorganization proceedings, not all have expressed an interest in this matter. RLEA has listed as respondents herein only those parties who have actively participated in the appeals from which the Writ of Certiorari is being sought.

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WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company; NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully requests pursuant to 28 U.S.C. § 1254(1) that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review and to reverse the Judgment of that court which was entered on November 16, 1981, affirming two orders of the United States

District Court for the District of New Jersey by which the District Court refused to impose an arrangement to protect employees as required by the unambiguous language of Section 17 of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915.

OPINIONS BELOW

The decision of the Court of Appeals is not reported and is reproduced herein as Appendix A at 1a. While the order from which RLEA had taken its appeal in the first of the two consolidated appeals involved herein (*i.e.*, 3rd Cir. No. 81-1121) is not published, the decision of the District Court was reported at 504 F. Supp. 851 (D.N.J. 1980); the decision is reproduced herein as Appendix B-2 at 5a, while the order is reproduced as Appendix B-1 at 3a. The order and opinion of the District Court in the second appeal (*i.e.*, 3rd Cir. No. 81-1929) were not reported and are reproduced herein as Appendices C-1 at 29a and C-2 at 31a. The decision of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] approving the "Plans of Liquidation" for the debtor New York, Susquehanna & Western Railroad Company [hereinafter, "NYS&W"] and the acquisition of its properties by another entity is reported at 363 I.C.C. 794 (1980); relevant portions are reproduced herein as Appendix D at 39a.[1]

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[1] RLEA has attached to this petition as Appendices E and F two unpublished opinions by the court of appeals which were entered on September 30, 1980, in earlier aspects of this case. *In re New York, S. & W. Ry.*, 633 F.2d 210-11 (3rd Cir. 1980) (Tables).

JURISDICTION

Petitioner RLEA had taken two appeals under Section 24(a) of the Bankruptcy Act, 11 U.S.C. § 47(a), from orders of the District Court which was sitting as a railroad reorganization court for the NYS&W under Section 77 of that Act.[2] The decision and Judgment of the Court of Appeals affirming the orders from which those appeals had been taken was entered on November 16, 1981; RLEA did not request rehearing. On February 4, 1982, petitioner was granted an extension to and including March 16, 1982, in which to file this petition. *RLEA* v. *Scott,* Sup. Ct. No. A-689. This petition has been filed within that extended time period and within one hundred and fifty (150) days of the date of the court of appeals' ruling. 28 U.S.C. § 2101(c). Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the proper interpretation to be given to the employee protection requirements in Section 17 of the MRRA, 45 U.S.C. § 915. Moreover, this case involves the scope of the abandonment and sale or transfer provisions of Sections 17(a) and (b) of that Act. Section 17 is reproduced herein as Appendix G at 63a. The Due Process and Just Compensation

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[2] The Bankruptcy Act, including Section 77, 11 U.S.C. § 205, has been repealed by the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549. That repeal, however, is not effective for cases, such as the proceeding at bar, which were pending under the Bankruptcy Act when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

clauses of the Fifth Amendment to the Constitution of the United States are also involved in this case.[3]

STATEMENT OF THE CASE

Sections 17(a) and (b) of the MRRA provide that whenever a Section 77 reorganization court authorizes an abandonment of a debtor's rail lines, or a sale or transfer of a debtor's rail line "to be used in continued rail operations," the reorganization court "shall provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347]." *E.g.*, 45 U.S.C. § 915(b)(1). According to the lower courts in this case, even though that congressional directive is clear and unambiguous on its face, and admits of no exception, the employee protection requirements of Section 17 of the MRRA were discretionary and not mandatory when, in the course of liquidating the debtor under Section 77 of the Bankruptcy Act, all of the NYS&W's rail lines were sold to a "non-carrier" entity for continued rail operations. Petitioner RLEA respectfully submits that such judicial legislation presents issues which are of grave national importance to railroad employees, and thus, to this nation's rail transportation system.

The NYS&W is a class III rail carrier[4] which in the late 1970s operated approximately seventy (70)

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[3] Relevant portions of the Fifth Amendment provide as follows: "[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

[4] 49 C.F.R. Part 1201, § 1-1(a), classifies rail carriers into three categories; those classifications are as follows:

> Class I—annual operating revenues of $50 million or more;
> Class II—annual operating revenues of more than $10 million but less than $50 million;
> Class III—annual operating revenues of $10 million or less.

miles of track in the State of New Jersey and which through a subsidiary, the Susquehanna Connecting Railway Company, owned five (5) miles of track in Pennsylvania operated by Conrail. Appendix D at 40a. Because of its poor financial condition, the NYS&W filed a petition on January 20, 1976, with the United States District Court for the District of New Jersey to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, and on March 4, 1976, respondent Walter G. Scott was appointed as Trustee of that debtor. Respondent Scott continued the operations of the NYS&W under the direction of the reorganization court and the protection of Section 77, but, unfortunately, the economy measures undertaken by the Trustee and by the employees, including a deferral of a portion of wages, were not sufficient to restore the debtor to financial health, in part because of the economic conditions of the area in which the NYS&W operated. Affidavit of K. Kyte at 2. On July 12, 1979, the reorganization court concluded without the benefit of a report from the ICC that "there is little or no hope of a successful reorganization" (Opinion dated July 12, 1979, at 2), and directed the Trustee "to submit a plan for orderly liquidation of the assets of the [debtor] . . . ." *Id.* at 3.[5]

In accordance with the reorganization court's directives the Trustee began to seek the regulatory approvals necessary to abandon the NYS&W's rail operations. Shortly after the MRRA was enacted, the

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[5] RLEA and other parties to the reorganization proceeding appealed that order and a subsequent order which modified the first order to require the Trustee to obtain regulatory approval before liquidating the estate. On September 30, 1980, the Third Circuit in an unpublished opinion affirmed those orders. That decision is reproduced herein as Appendix E at 55a.

Trustee filed with the ICC on January 2, 1980, an application to abandon the entire NYS&W system under Section 17(a) of that Act. Appendix D at 40a. However, while that application was pending before the ICC for its advisory report, the reorganization court considered three separate offers to acquire the rail assets of the debtor for continued rail operations. On May 28, 1980, the reorganization court issued an opinion accepting the offer of the Delaware Otsego Corporation [hereinafter, "DO"], a corporation engaged in the operation of five short line railroads, to acquire all assets of the NYS&W, including the NYS&W's subsidiary, for $5,000,000 in cash. As the court stated in explaining its ruling:

> The $5,000,000 in cash [offered by the DO to acquire the NYS&W's lines] is better than contingent financing. The DO Corporation is economically viable. It has the ability to continue rail service evidenced by its operation of other short line railroads. Lastly, DO has made significant commitments to the present employees of the Debtor which, although not fully satisfying the unions involved, present logical solutions in an attempt to revamp the operation of a failing railroad. When the Court considers the testimony and cross-examination which occurred at the April 15, 1980, hearing, the conclusion is inescapable: the Trustee must accept the offer of the DO Corporation.

Opinion dated May 28, 1980, at 9-10. By Order 104 dated August 5, 1980, the reorganization court approved a contract of sale for all of the NYS&W operating assets to the DO and to its wholly owned subsidiary, the New York, Susquehanna and Western Railway Corporation [hereinafter, "new-NYS&W"];

the new-NYS&W was incorporated on March 17, 1980. Appendix B-2 at 9a.

Order 104 also authorized to Trustee to terminate service over the debtor's lines on August 29, 1980. Several days later, on August 12, 1980, the ICC issued its report under Section 17(a) of the MRRA recommending that the court authorize the Trustee to abandon the NYS&W's lines. Appendix D at 41a. However, the court never held a hearing or entered an order expressly adopting that report. Nevertheless, the NYS&W terminated service on August 29, 1980, and the new NYS&W began operations over those same lines with the same equipment on the next business day, September 2, 1980, under a Service Order issued by the ICC.[6] Service Order No. 1483, served August 29, 1980.

Shortly after the reorganization court directed the Trustee to begin to liquidate the debtor, RLEA asserted that applicable provisions of the Interstate Commerce Act (*i.e.*, 49 U.S.C. § 10903(b)(2)) and then the MRRA (*i.e.*, Section 17), required that a fair arrangement be imposed to protect employees who were affected by the demise of the debtor. When the court authorized the sale of the NYS&W's rail lines to the DO and its subsidiary without providing the employee protective provisions mandated by Section 17 of the MRRA, RLEA took an appeal from those orders to the United States Court of Appeals for the Third Circuit. 3rd Cir. No. 80-1977. On September 30, 1980, the court of appeals issued a per curiam order dis-

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[6] RLEA sought to stay the implementation of Order No. 104 because of the lack of employee protection; however, both the District Court and the Third Circuit denied RLEA's requests.

missing RLEA's appeal as premature because shortly before oral argument the reorganization court had scheduled a hearing to consider the issue of employee protection as part of its consideration of the Second Amended Plan of Liquidation which had been filed by the Trustee on August 5, 1980. That unpublished decision of the court of appeals is reproduced herein as Appendix F at 61a.

On September 23, 1980, the reorganization court conducted a hearing on the Trustee's motion for approval of the amended plan of liquidation even though the ICC had neither conducted hearings on the plan nor certified it to the court under Section 77(d) of the Bankruptcy Act. One of the issues considered by the Court at the hearing was RLEA's assertion that Section 17 of the MRRA required the imposition of an arrangement to protect employees. The evidence adduced at the hearing on this issue showed that there had been a steady decline in employment on the NYS&W from the summer of 1979 until the new-NYS&W began operations in September 1980. Of the 73 people who were employed by the debtor shortly before the court ordered it to be liquidated, only 59 remained employed by January 1980. That number continued to decline further so that on August 29, 1980, only 24 or 25 were still actively employed by the debtor.[7] Twenty-three (23) of those people became employees of the new-NYS&W on September 2, 1980.[8] Appendix B-2 at 13a.

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[7] This reduction in employment occurred as a result of attrition, retirements, technological improvements and job abandonments.

[8] One of the remaining two employees on August 29, 1980, died before the new-NYS&W resumed operations on September 2, 1980.

Those employees who were hired by the new-NYS&W were paid rates of pay which generally equaled the rates paid by the NYS&W, but because of the manner in which overtime and other bases of pay were calculated on the new operator, the total compensation received by former NYS&W employees was expected to be less than they had received before. Also, employees who were hired by the new-NYS&W lost the job security which had been provided to them by their collective-bargaining agreements with the NYS&W which protected them from arbitrary and unilateral actions by their employer. Appendix B-2 at 14a-15a.

In its sale contract with the Trustee, the DO agreed to provide a limited form of monetary benefits to NYS&W employees who were not hired by the new-NYS&W. Those benefits were considerably less protective of the interests of employees than those required as a minimum by 49 U.S.C. § 11347. *See generally, New York Dock Ry.—Control,* 360 I.C.C. 60 (1979), *aff'd, New York Dock Ry.* v. *United States,* 609 F.2d 83 (2d Cir. 1979). However, before the transfer of operations occurred, the Trustee negotiated individual releases with several NYS&W employees whereby those employees, in exchange for a lump sum which was made up of a compromise of several figures, including the deferred wages, relinquished all claims against the estate. RLEA asserted that those releases were invalid because the employees entered into them without a knowledge of their rights, and because the unions had been excluded from the negotiation process in contravention of the Railway Labor Act, 45 U.S.C. § 151, *et seq. See,* Appendix B-2 at 13a-14a, 27a n.3.

After considering the arguments advanced by petitioner RLEA and by the opponents to RLEA's posi-

tion, the reorganization court concluded in an opinion filed on November 18, 1980, that it should not require either the Trustee or the DO to provide an arrangement to protect employees. Appendix B-2 at 27a. According to the reorganization court, the transaction before it was one within the meaning of the abandonment provisions of Section 17 of the MRRA, *i.e.*, Section 17(a), 45 U.S.C. § 915(a), because it involved "the total abandonment of the debtor's rail service by the Trustee." Appendix B-2 at 10a. Even though the lines of the NYS&W were being sold to the DO for continued rail usage, the court concluded that Section 17(a) nevertheless governed because the Trustee "does not simply 'abandon his abandonments' . . . ." *Id.* at 9a, *quoting, In re Chicago, Milwaukee, St. Paul & Pac. R.*, N.D. Ill. No. 77 B 8999, Order No. 297, decided February 29, 1980, slip op. at 5, *aff'd*, 658 F.2d 1149 (7th Cir. 1981), *cert. denied*, Sup. Ct. No. 81-1250, March 8, 1982.

While Section 17(a), like Section 17(b)(1) of the MRRA, appeared to be mandatory in its command that employee protection be imposed when an abandonment was authorized, the court held after an analysis of prior law that it nevertheless had the discretion to decline to impose employee protective provisions in an entire line abandonment case. Appendix B-2 at 17a. As the Court stated: "The distinction between partial and total abandonments has been recognized as important by this Court and other Courts, in the related situation where creditors assert their *Brooks-Scanlon* rights." Appendix B-2 at 18a (footnote omitted).[9] In

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[9] *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920). *Brooks-Scanlon*'s constitutional holding is potentially an issue in this case because the liquidation order was premised upon a claim of erosion. *See*, Appendix E at 58a, and Appendix B-2 at 24a-25a.

light of the circumstances of this case, including the fact that the court had earlier ruled that "it was constitutionally impermissible for this debtor to continue operations" (Appendix B-2 at 25a), the court concluded that "labor protective provisions shall not be imposed upon any party in these proceedings including the Debtor, the Trustee, Delaware Otsego Corporation and the New York, Susquehanna and Western Railway Corporation . . . ." Appendix B-1 at 3a-4a. RLEA noted an appeal from that decision and order on December 22, 1980. 3rd Cir. No. 81-1121.

While RLEA's appeal from the November 1980 decision was pending, the ICC issued its decision under Section 77(d) of the Bankruptcy Act on the Plans of Liquidation. On December 27, 1980, the ICC certified those plans as complying with Section 77 of the Bankruptcy Act (Appendix D at 51a), observing in part that the Plans contained provisions for the preservation of the debtor's rail services by a successor entity. Appendix D at 46a. The ICC's decision also authorized the new-NYS&W to acquire and to operate the debtor's rail lines. Appendix D at 52a. On March 24, 1981, the court conducted a hearing under Section 77(e) of the Bankruptcy Act, 11 U.S.C. § 205(e), and shortly thereafter issued an order approving the Plans. Appendix C-1 at 29a. In its opinion which preceded that order, the court noted that the Plan provided a fair return to the estate for the property being sold to the DO. As the court stated:

> In this connection, I find that the liquidation value of $3,022,000 which appears in the Gross Appraisal, previously made a part of the record in these proceedings, would have constituted a fair upset price for the debtor's assets. The $5,000,000 to be received from the subsidiary of Delaware

> Otsego is well in excess of that figure and compares favorably with the value of $5,000,000 ascribed to the debtor as a going concern by the Gross Appraisal.

Appendix C-2 at 35a.

RLEA had asserted both before the ICC and before the reorganization court that Section 17 of the MRRA mandated that an appropriate employee protective arrangement be imposed and that the plan must reflect such provisions. Since the proposed plans did not provide for employee protective benefits, RLEA contended that they should not be approved as satisfying the criteria of Section 77(b) or (d). Appendix D at 44a. RLEA's argument was rejected by the ICC because, in the ICC's view, even if Section 17(b) of the MRRA governed as RLEA asserted, it was the responsibility of the court, and not of the Commision, to impose employee protective provisions. *Id.* at 47a-48a. The reorganization court also rejected RLEA's arguments, but it did so because it observed that it had previously considered the same argument and had rejected it by the earlier order from which RLEA had taken its appeal in 3rd Cir. No. 81-1121. Appendix C-2 at 32a. RLEA noted an appeal from that order on April 29, 1981. 3rd Cir. No. 81-1929. Both appeals were consolidated by the appellate court.

RLEA's appeals were rejected by the court of appeals by a one-page "Judgment Order" which did not give any detailed explanation for its ruling, but simply stated that the orders of the District Court were being affirmed "for essentially the reasons set forth" in the lower court's opinion of November 1980. Appendix A at 1a. The appellate court also cited without ex-

planation the unpublished decision of the Seventh Circuit (*i.e., In re Chicago, Rock Island & Pac. R.*, 7th Cir. Nos. 80-1788, 80-2199 and 80-2286, decided October 13, 1981) which affirmed the ruling of the Rock Island reorganization court [hereinafter "*Rock Island Abandonment* decision"] authorizing the abandonment of the entire Rock Island without imposing an arrangement to protect employees under Section 17(a) of the MRRA.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions of Federal Law, Including Recurring Constitutional Issues, Which Should Be Decided By This Court To Settle The Extent of Congress' Constitutional Authority To Protect Employees Affected By The Liquidation Of A Railroad.

Congress and this Court have long recognized that the railroad employee is an essential part of this nation's rail transportation system. *E.g., United States* v. *Lowden*, 308 U.S. 225, 235-37 (1939). Moreover, both Congress and this Court have emphasized that there is a strong public interest in guaranteeing the "stability of the labor supply available to railroads" (*ICC* v. *Railway Labor Executives Assoc.*, 315 U.S. 373, 377 (1942)), and consequently, for almost fifty (50) years Congress has enacted legislation to assure that stability by shielding railroad workers from being required to bear unaided the harsh economic consequences of measures which their employers might take to protect their investments in rail property. *E.g.*, Section 7, Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 213-14; Sections 1170(e)(1) and 1172(c)(1) of the Bankruptcy Code, as amended, 11 U.S.C. §§ 1170 (e)(1), 1172(c)(1); Sections 10903(b)(2) and 11347

of the Interstate Commerce Act, 49 U.S.C. §§ 10903 (b)(2), 11347.

In passing the MRRA in November 1979, Congress transferred to Section 77 railroad reorganization courts certain powers to regulate railroads which it had previously delegated to the Interstate Commerce Commission. But consistent with its longstanding policy to require railroads to protect the interests of their employees, Congress conditioned the authority it was delegating to the reorganization courts by providing in Section 17(a) of the MRRA, 45 U.S.C. § 915(a) (emphasis added), that: "In authorizing *any* abandonment pursuant to this section, the court *shall require* the carrier to provide a fair arrangement *at least as protective* of the interests of employees as that required under . . . [49 U.S.C. § 11347]." Section 17(b)(1) of the Act placed a similar restriction on the authority of the reorganization court to authorize "any" sale or transfer of a debtor's rail lines to be used in continued rail operations. Even though the language of Section 17 is clear and unambiguous in mandating that employee protections be imposed whenever a Section 77 reorganization court exercised its new powers under that section, the lower courts in this case have concluded that there was an implied exception to that mandatory command where the debtor was "abandoning" its entire operations.

Petitioner RLEA respectfully submits that such a judicially legislated implied exception emasculates the carefully woven protective scheme which Congress has created under its Commerce Clause powers for railroad employees, and upon which railroad employees have relied in serving faithfully both their employers and the public. As Congress' actions in twice enacting the

recently stricken employee protective provisions of the Rock Island Transition and Employee Assistance Act[10] show, the protection of railroad employees when a railroad is being liquidated presents an issue which is important to our national interests. Since the sole justification for reading such an exception into the clear and unambiguous language of the statute is the conclusion that Section 17 of the MRRA's employee protection requirement would be unconstitutional if interpreted as it plainly reads, it is important, petitioner respectfully submits, that this Court examine the lower court's decisions. Indeed, the decision of the NYS&W reorganization court and the *Rock Island Abandonment* decision strongly suggest that their rulings were premised in part upon the Constitution. *See,* Appendix B-2 at 25a.

A. By Judicially Legislating An Exception To The Clear And Unambiguous Command That Employees Be Protected Whenever A Section 77 Reorganization Court Authorized An Abandonment, The Lower Courts Have Decided This Case In A Manner Which Conflicts with Applicable Decisions Of This Court.

Article 1, Section 8, Clause 3 of the Constitution of the United States gives Congress the power to regulate interstate commerce, and consequently, the separation of powers doctrine requires that federal courts be especially careful that they not engage in judicial legislation under the guise of statutory construction.

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[10] P b.L. No. 96-254, 45 U.S.C. § 1001, *et seq.* On March 2, 1982, this Court concluded that the employee protective provisions of that Act (*i.e.*, §§ 106 and 110, 45 U.S.C. §§ 1005, 1008) were unconstitutional as being a non-uniform Bankruptcy law. *Railway Labor Executives' Assoc.* v. *Gibbons,* Sup. Ct. Nos. 80-415, 80-1239, decided March 2, 1982.

It is for this reason in particular that the lower courts should have heeded the admonition of this Court that the "starting point" in the construction of a statute is "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979). Where the words of a statute are "sufficient in and of themselves to determine the purpose of the legislation[,]" there is no need to look to aids of construction, such as inferences to be drawn from the legislative history, for there is, "of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assoc., Inc.*, 310 U.S. 534, 543 (1940).

Where the words used by Congress in a statute are clear, this Court has "historically assumed that Congress intended what it enacted." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). Consequently, when it is found that the terms of a statute are unambiguous, "judicial inquiry is complete except 'in "rare and exceptional circumstances." ' " *Rubin* v. *United States*, 449 U.S. 424, 430 (1981), *quoting TVA* v. *Hill*, 437 U.S. 153. 187 n.33 (1978), *quoting Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930). Petitioner RLEA respectfully submits that the lower courts have disregarded those admonitions in construing the employee protection requirements of Section 17 of the MRRA to achieve a result which coincided with their view, but not with Congress' view of what regulation was appropriate in this case. *But see, Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943).

As even a cursory review of Section 17 of the MRRA shows, that section's employee protective provisions are clear and unmistakable in prescribing that the requirement for the imposition of an employee protective arrangement is mandatory; the language of that statute "admits of no exception." *TVA* v. *Hill, supra,* 437 U.S. at 173. Nevertheless, the NYS&W reorganization court ignored that mandatory command because its view of legislative intent and of the ICC's construction of a comparable statute (*i.e.,* 49 U.S.C. § 10903(b)(2)) led it to conclude that when Congress used the word "shall" in Section 17, it really meant "may in an entire line abandonment case." Appendix B-2 at 20a-24a. Such disregard of the clear import of the language which Congress employed in Section 17 of the MRRA, petitioner RLEA submits, is in direct conflict with the instructions which this Court has given lower federal courts in enforcing the directives of Congress. *E.g., TVA* v. *Hill, supra.*

An even more troublesome aspect of this case is that the putative justifications relied upon by the reorganization court to judicially legislate an exception which Congress did not enact, do not support the inference that Congress intended an exception to exist for an entire line abandonment. Although it is correct that the MRRA legislative histoy shows that Congress "intends to make no change in existing law as it affects employee protection" (H. Rpt. No. 96-583, 96th Cong., 1st Sess., at 27 (1979)), there is not a single statement in either the congressional reports or debates which refers to the "entire line abandonment" exception relied upon by the lower courts. The sole pre-MRRA support for the existence of such an exception are several decisions by the ICC construing similar

language in 49 U.S.C. § 10903(b)(2). *E.g., Wellsville, A.&G.R.—Abandonment,* 354 I.C.C. 247 (1978). But as an examination of that line of cases shows, those decisions suffer from the same infirmity as does the case at bar—the ICC ignored the plain language of the statute in treating mandatory language as being discretionary.

Prior to the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, employee protection in all abandonment cases was discretionary in that the ICC was not required to impose such provisions in authorizing an abandonment. *E.g., ICC* v. *Railway Labor Executives' Assoc, supra.* It was during the pre-4R Act period of time that the Commission enunciated its entire line abandonment policy. *Chicago, A. & S.R.—Abandonment,* 261 I.C.C. 646 (1946). However, when Congress passed the 4R Act in 1976, it made the imposition of employee protection mandatory in *all* abandonment cases by providing as part of Section 802 of that Act (since recodified as 49 U.S.C. § 10903(b)(2)) that: "Each certificate [authorizing any abandonment] shall . . . contain provisions to protect the interests of employees."

That clear and unambiguous language was disregarded by the ICC in its *Wellsville* decision because the Commission relied upon a statement in the Conference Report to the 4R Act that the employee protective provision of Section 802 of that Act was added "without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company . . . ." H. Rpt. No. 94-781, 94th Cong., 2d Sess. at 218

(1976). Such reliance was misplaced. Not only is that statement contradicted by the plain language of the statute, but it is also contrary to an earlier congressional report on this provision of the 4R Act where such an exception is not even mentioned even though employee protection was being made mandatory. *See,* H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 76 (1975) (purpose of provision is to make mandatory what was discretionary and to provide that "adequate protection of jobs . . . be afforded those who choose a carrier in railroad jobs"); *See also, National Small Shipments Traffic Conf., Inc.* v. *CAB,* 618 F.2d 819, 828 (D.C. Cir. 1980) (danger of relying upon statements in reports to overrule clear statutory language).

When the NYS&W's opinion is examined closely, it becomes apparent that the court disregarded the plain language of Section 17 of the MRRA because of the statement that was contained in a report issued more than three years before the MRRA was even proposed.[11] Unfortunately, this decision has an impact on more than just the NYS&W. When taken together with the *Rock Island Abandonment* decision, these two cases sound the death knell for employee protection in an entire line abandonment case. First, they sanction the ICC's interpretation of a similar provision in the Interstate Commerce Act. And second, these decisions have construed language virtually identical to that added to the Bankruptcy Code by Section 227 of the

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[11] While it is correct that there are subsequent legislative expressions which indicate that Congress would create an exception in Section 17(a) for short line railroads such as the NYS&W (*e.g.,* Appendix B-2 at 26a-27a), this Court has concluded that expressions of Congressional probabilities are not the same as Acts of Congress. *TVA* v. *Hill, supra,* 437 U.S. at 189.

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1931,[12] and thus, a similar result can be expected when rail labor argues that Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, requires that employees be protected in a railroad liquidation under the new Bankruptcy Code. Indeed, such a result has occurred in the only railroad reorganization under the new code. *In re Auto-Train Corp.*, 11 B.R. 418 (D.D.C. 1981), *vacated,* D.D.C. No. 81-1721, decided October 28, 1981.

B. *This Court Alone Can Remove The Constitutional Uncertainty Which This Case And The* Rock Island Abandonment *Rulings Have Placed Upon Congress' Power To Require That A Liquidating Railroad Aid Its Employees.*

Reorganization proceedings for railroads traditionally produce a great tension between demands of creditors and investors for an immediate recoupment of their equity before it erodes any further, and the need

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[12] Section 227 of the Staggers Rail Act provides as follows:

(a) Section 1170 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:

"(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.

"(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.".

(b) Section 1172 of title 11, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) In approving an application under subsection (b) of this section, the Commission shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.

"(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.".

of the public for a continuation of essential rail services. Nowhere is that tension greater than in attempts to enforce in a railroad reorganization proceeding the longstanding commands of Congress that railroad employees not be required to bear unaided the harsh consequences which flow from changes in ownership or operation of rail lines. Not only is there a great reluctance on the part of federal courts to enforce those commands, but lurking in the background are substantial constitutional issues as to whether Congress may require such aid without affronting either the Due Process clause or the Just Compensation clause of the Fifth Amendment. *See,* note 3, *supra,* at 4. Such constitutional questions have recently been posed, but have not been definitively resolved. *See, Railway Labor Executives' Assoc.* v. *Gibbons,* 448 U.S. 1301, 1305 (1980) (Justice Stevens, in chambers); *In re Valuation Proceedings,* Special Court Misc. No. 76-1, decided November 24, 1981, slip op. at 104 n.131 and accompanying text, and at 116 n.142 and accompanying text.[13]

Once it is concluded that the lower courts improperly construed the command of Section 17 of the MRRA, this case together with the *Rock Island Abandonment* case squarely pose this constitutional question. Here, the NYS&W reorganization court, like the Rock Island reorganization court, had previously concluded "that it was constitutionally impermissible for . . . [those debtors] to continue operations . . . ." Appendix

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[13] According to the Special Court: "The amount of labor protection benefits that unions could obtain would have been limited by the amount by which the proceeds of the rail use sales would have exceeded proceeds from sales for scrap." *Id.* at 116 (footnote omitted). In this case, that amount is almost $2 million. Appendix C-2 at 35a.

B-2 at 25a. Both courts relied upon *Brooks-Scanlon* [14] to reach such a conclusion, for in that case this Court stated that: "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." 251 U.S. at 399. The *Rock Island* court went further and found that the carrier's constitutional right to discontinue operations did "not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance." *In re Chicago, Rock Island & Pac. R.*, N.D. Ill. No. 75 B 2697, Order No. 248 at 1, *aff'd*, 7th Cir. No. 80-1788, decided October 13, 1981 (unpublished). That reasoning was relied upon by the NYS&W courts to deny RLEA's request that the employee protective provisions of Section 17 of the MRRA be enforced. Appendix B-2 at 24a-25a.

In placing such great reliance on *Brooks-Scanlon*, however, the *NYS&W* and *Rock Island* courts ignored other decisions of this Court which have qualified the right of creditors and investors to withdraw their property from a losing venture. *E.g., Penn-Central Merger Cases*, 389 U.S. 486, 511 (1968). As the Seventh Circuit recently summarized that qualification:

> When the continuation of rail service is essential for the protection of the public interest, the courts have . . . determined that the shareholders' right to realize the value of the property may be held in abeyance for a reasonable period while a solution, acceptable to both the public and private interests, can be devised.

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[14] *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920).

Gibbons v. *United States,* 7th Cir. Nos. 79-2413, *et al.,* decided October 7, 1981, slip op. at 20. Consequently, it is only after that solution is devised and implemented that the *Brooks-Scanlon* doctrine absolves the debtor from further expenditures in the public interest.

Our Constitution gives Congress the power to regulate interstate and foreign commerce (U.S. CONST., Art. I, § 8, cl.3), and thus, it is Congress' responsibility to devise the solution which it believes is required by the public interest. *Accord, Ecker* v. *Western Pac. R., supra.* Section 17(a) of the MRRA represents the solution which Congress has devised to resolve the transportation crisis caused by the abandonment of railroad lines of a railroad in reorganization, and included in that solution is the command of Congress that the interests of railroad employees be protected. While Congress' solution may also confer a private benefit upon employees, that fact does not detract from the conclusions that the solution serves a public purpose (*ICC* v. *Railway Labor Executives' Assoc., supra,* 315 U.S. at 378) and is one that has been found by this Court to be consistent with Due Process. *United States* v. *Lowden, supra,* 308 U.S. at 240.

The constitutional issue posed herein is obviously an important question of federal law within the meaning of Rule 17.1(c) of the Rules of this Court. Petitioner RLEA respectfully submits, therefore, that this Court should address this issue so as to remove the uncertainty which has recently been created over Congress' power to regulate matters of employee-employer relations where the employer is a liquidating railroad. Unless this issue is addressed by this Court, rail labor and Congress will not know with certainty

the extent of Congress' Commerce Clause powers over a liquidating railroad. Since this Court has recently ruled that Congress may not constitutionally address this question on a case-by-case basis without affronting the Bankruptcy Clause of the Constitution (Art. I, § 8, cl. 4), it is apparent that only a general statute such as that at bar can be enacted. *E.g., Railway Labor Executives' Association* v. *Gibbons, supra,* note 10.

However, if the statutory construction or constitutional issues posed by this case are not addressed now, there is a substantial chance that they will arise again, but in a situation where Congress' command that employee protection be imposed is again frustrated and ignored. Employee protective payments must be paid as the employees are affected. A delay while the issue is litigated will serve only to frustrate the purpose for which protections were required.

II. The Decision By The Courts Below to Treat the Transaction at Bar as Being an Abandonment Rather Than a Sale or Transfer for Continued Rail Usage Presents an Issue Which Has Not Been Decided by This Court but Which is Important to the Orderly Administration of Federal Statutes Regulating Railroad Abandonments and Sales.

Section 17(b)(1) of the MRRA is specific in that it applies to "the sale or transfer of a line of railroad [belonging to the debtor] to be used in continued rail operations . . . ." 45 U.S.C. § 915(b)(1). Section 17(b) goes on to provide that "an appropriate application with respect to such sale or transfer" must be filed with the ICC, and that the reorganization court may set the maximum time in which the Commission could consider such application. Section 17(b)(2), 45 U.S.C. § 915(b)(2). That subsection further provides that the reorganization courts, and thus not the appellate courts

under 28 U.S.C. § 2321(a), are given the authority to review the ICC's action on the application. 45 U.S.C. § 915(b)(2). And in keeping with its intent to preserve as much rail service as possible (*e.g., In re Chicago, Milwaukee, St. Paul & Pac. R.*, 641 F.2d 482, 487 (7th Cir. 1981)), Congress gave the reorganization court the authority to authorize interim operations over the line to be sold while the ICC processed the sale or transfer application. Section 17 (b)(3), 45 U.S.C. § 915(b)(3).

While Section 17(a) of the MRRA gives the reorganization court expanded powers over abandonment applications by a debtor, there are several important distinctions between the powers given to the courts under Sections 17(a) and (b). First, in the case of abandonments, the ICC's role is advisory, whereas the ICC has a veto power over a sale or transfer. And second, the reorganization court's jurisdiction in an abandonment extends to the debtor only, whereas in a sale or transfer case, the court's jurisdiction covers the buyer as well. These differences have important consequences for employees, especially insofar as the jurisdiction of the court under Section 17(b)(1) is concerned, for that subsection, RLEA submits, requires the buyer to comply with the obligations imposed to protect employees. *See*, 45 U.S.C. § 565(b).

Even though the plain language of the statute strongly indicates that the transaction at bar was a sale or transfer under Section 17(b), the reorganization court concluded that Section 17(a) governed. Section 17(b), according to the court, had no application to this case mainly because the court had earlier instructed the Trustee to liquidate the debtor. Appendix B-2 at 9a-10a. A fundamental problem with

such a conclusion is that a Section 77 reorganization court does not have the jurisdiction to liquidate a debtor. *See, Penn Central Transportation Co.—Reorganization,* 347 I.C.C. 45, 84-85 (1973). Rather, the court must try to assure that the bulk of the rail properties will continue to be operated as a railroad by someone, or dismiss the petition if that cannot be accomplished. *E.g., In re Lehigh Valley R.,* 558 F.2d 137, 145 (3rd Cir. 1977). In this case, the rail properties were sold pursuant to the Plan of Liquidation to the DO to preserve rail service. Appendix D at 46a. While initially the liquidation was erroneously proceeding as an abandonment, it was transformed into a sale or transfer for continued rail operations.

This issue is important to the orderly administration of the MRRA because the NYS&W decision is applicable to the manner in which the Rock Island is being liquidated. That Section 77 proceeding is also under Section 17 of the MRRA, and in that case the reorganization court has authorized the abandonment of virtually all of the debtor's rail lines. Relying upon the Seventh Circuit's decision in *In re Chicago, Milwaukee, St. Paul & Pac. R.,* 658 F.2d 1149 (7th Cir. 1981), *cert. denied,* Sup. Ct. No. 81-1250 (March 8, 1982), which in turn relied upon the *NYS&W* decision (658 F.2d at 1169-71), the ICC has now concluded that applications by newly formed railroads to buy Rock Island lines are not governed by Section 17(b) of the MRRA, but rather by 49 U.S.C. § 10901 alone. *E.g., Little Rock & W. Ry.—Purchase,* ICC Finance Docket No. 29471, served February 16, 1982. As a result of that conclusion, the ICC has determined that it need not protect employees (*Id.* at 4), and there is a substantial question as to where a review

action, if any, can be brought. *Compare,* 28 U.S.C. § 2321(a), *with,* 45 U.S.C. § 915(b)(2).

The ICC's rejection of Section 17(b) is premised mainly upon its conclusion that a sale or a transfer to an existing carrier is governed by Section 17(b), whereas a sale or transfer to a newly formed carrier is governed first by Section 17(a) and then by 49 U.S.C. § 10901, because a newly formed railroad is not a "rail carrier" until it obtains permanent operating authority. *Little Rock & W. Ry.—Purchase, supra* at 1 n.1. This is consistent with the rulings in this case (Appendix B-2 at 10a), but is entirely inconsistent with the treatment of companies such as the new-NYS&W under the interim operation provisions of both the Interstate Commerce Act (49 U.S.C. § 11123) and the Rock Island Transition and Employee Assistance Act (Section 122, 45 U.S.C. § 1017) where the ICC has considered such companies to be "rail carriers." *E.g.,* Service Order No. 1483 (new-NYS&W), served August 29, 1980; Service Order No. 1473, 33rd Revision (Kyle Railroad Co.), denial of request to reconsider by RLEA, dated February 26, 1982.

Arguments premised upon expediency, if not supported by sound legal principles, can often lead to absurd results. *Cf., Gibbons* v. *United States,* 660 F.2d 225, 229 (7th Cir. 1981). This is what has happened in this case simply because the parties wished to avoid the obligations to employees which Congress has mandated be imposed. Petitioner respectfully submits that the orderly administration of both the MRRA and the Interstate Commerce Act would be advanced if this Court were to review the relationship between the transaction at bar and Sections 17 (a) and (b).

CONCLUSION

For the reasons set forth herein, Petitioner Railway Labor Executives' Association respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Third Circuit.

Respectfully submitted,

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Attorney for Petitioner

Date: March 16, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1121, 81-1929

In the Matter of

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Debtor

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*

Appeal From The United States District Court
For The District Of New Jersey
(D.C. No. B-76-0182 In Bankruptcy)

Argued November 12, 1981

Before: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*,
and CAHN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by the appellant and for essentially the reasons set forth in the district court's opinion at 504 F. Supp. 851 (D.N.J. 1980), *see also In re Chicago, Rock Island & Pacific R.R.*, Nos. 80-1788, -2199, -2286 (7th Cir. Oct. 13, 1981), it is

ADJUDGED AND ORDERED that the judgments of the district court dated November 25, 1980 and April 14, 1981 be and the same are hereby affirmed.

Costs will be taxed against the appellant.

BY THE COURT:
/s/
Circuit Judge

Attest:
Chief Deputy Clerk
DATED: November 16, 1981

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* Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. B-76-182

In the Matter of:

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

**ORDER RELATING TO
LABOR PROTECTION
ORDER NO. 109**

(Original Filed November 25, 1980)

This matter having been opened to the Court upon the Trustee's filing of a Second Amended Plan of Liquidation, and there having been a hearing relative to same on September 23, 1980, and the Court having called for and received memoranda and proposed findings of fact and conclusions of law with respect to the issue of labor protection as it pertains to the Plan of Liquidation, and the Court having considered said memoranda and proposed findings of fact and conclusions of law and having issued its Opinion dated November 18, 1980; and good and sufficient cause appearing for the making and entry of the within Order,

It is on this 25th day of November, 1980,

ORDERED that the disposition of assets of the Debtor Railroad by the Trustee, heretofore ordered by the Court, is an abandonment pursuant to Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. 915(a), and it is further

ORDERED that labor protection provisions shall not be imposed upon any party in these proceedings including the

Debtor, the Trustee, Delaware Otsego Corporation and The New York, Susquehanna and Western Railway Corporation, and it is further

ORDERED that the Trustee's First and Second Amended Plans of Liquidation need not be modified to provide for labor protection provisions.

/s/ LAWRENCE A. WHIPPLE
Lawrence A. Whipple, Senior Judge

APPENDIX B-2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Action No. B 76-182

In the Matter of:

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

OPINION

(Original Filed November 18, 1980)

WHIPPLE, *Senior Judge.*

To All Counsel of Record:

Presently pending before this Court is the Second Amended Plan of Reorganization (the "Plan") for the New York, Susquehanna & Western Railroad Company ("NYS&W"). While a determination as to approval or disapproval of the Plan shall not be made by this Court until a report on the Plan is received from the I.C.C.[1], one important issue pertaining to the Plan is ripe for adjudication at this time. This issue is the question of whether or not this Court must impose certain labor protection provisions in this case, either through a requirement that the Plan include such provisions, or otherwise. According to the Milwaukee Railroad Restructuring Act, 45 U.S.C. 901, 915, determination of the labor protection issue is within the province of the Court, and not the I.C.C. *See also New York, S. & W.R. Co. Abandonment,* Docket No. B-210 [*sic*]

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[1] At the request of the I.C.C. this Court extended the time for submission of the I.C.C.'s report until December 29, 1980. See letter of this Court dated October 31, 1980.

(Sub No. 1) (Aug. 12, 1980); *In re Chicago, Rock Island & Pacific R. Co.*, No. 75-B-2697 (N.D. Ill., June 2, 1980).

In such a situation, the imposition of labor protection provisions may be discretionary or mandatory and may depend upon the specific circumstances of the given case.

Accordingly, the two questions to be addressed are:
1. Is the disposition of assets heretofore ordered by this Court and presently being carried out by the Trustee an "abandonment" or a "sale or transfer"?
2. If the disposition is an abandonment, must labor protection provisions be imposed?

Abandonment vs. Sale or Transfer

In order to put the analysis of the disposition of the assets of NYS&W into perspective, a brief summary of recent events in this reorganization is required.

In July 1979, this Court determined that the creditors had suffered an unconstitutional taking of their property, and that the debtor was not reorganizable. This Court thereafter ordered the Trustee to cease railroad operations and to commence an orderly liquidation of its assets. (July 12, 1979 Opinion and Order No. 81). In August, 1979, this Court modified Order No. 81, directing the Trustee to file with the Interstate Commerce Commission ("ICC") and the New Jersey Department of Transportation ("NJDOT") "all appropriate applications and supporting documents necessary to bring before those agencies the termination and abandonment of the entire operation of the debtor." (August 24, 1979 Opinion and Order 83). The ICC and NJDOT were further ordered to submit reports to this Court on the Trustee's applications. Orders 81 and 83 were affirmed by the United States Court of Appeals for the Third Circuit on September 30, 1980. In the matter of *New York, Susquehanna & Western Railroad Co.*, Nos. 79-2531 and 79-2532 (3d Cir. filed September 30, 1980).

In an effort to conform to the District Court's order, the Trustee petitioned the ICC under 49 U.S.C. § 10505 for exemption from certain procedural requirements. On November 4, 1979, the Milwaukee Railroad Restructuring Act, P.L. 96-101, 93 Stat. 736, 45 U.S.C. 901 *et seq.* ("Milwaukee Act") became law. The effect of the passage of the Milwaukee Act was to cause the ICC to dismiss as moot the Trustee's application for exemption. *ICC Decision, Walter G. Scott, Trustee-Exemption Under 49 U.S.C. 10505,* Docket No. AB-210 (Nov. 29, 1979) (hereinafter "Trustee's Exemption"). The ICC held that "NYSW meets the criteria of . . . [Section 17(a) of the Milwaukee Act] . . . the Bankruptcy Judge may approve abandonment regardless of Commission action." *Trustee's Exemption.*

The Trustee thereafter resubmitted materials to the ICC, and on August 12, 1980, that agency filed a report and recommendation with this Court. In that document, the ICC recommended that the Trustee should be permitted to abandon the debtor's entire line. *New York Susquehanna and Western Railroad Company—Abandonment,* Docket No. AB-210 (Sub No. 1) (service date August 12, 1980) (hereinafter "*NYS&W Abandonment*").

Consistent with New Jersey's regulatory process, a hearing was held before the Administrative Law Judge on the Trustee's application to discontinue operations and abandon the line. In her Initial Decision, which was adopted as the Final Decision of the NJDOT on August 27, 1980, Judge Sybil Moses ordered that the Trustee's application to discontinue and abandon operations be granted.

The debtor has been operating at a loss since it went into reorganization in January 1976. *NYS&W Abandonment,* at 2. This Court has repeatedly concluded that there is no possibility that the debtor can continue to operate under present conditions, given the deterioration of its physical plant, and its untenable financial position.

On March 21, 1979 the Department of Transportation completed an analysis of the costs of upgrading the Railroad's tract to FRA Class 2 standards. The Department of Transportation estimated the costs of upgrading the debtor Railroad track (not including the cost of reconstruction of bridges and grade crossings) to be approximately $1,700,000.00.

Three separate engineering surveys, commissioned by the Department of Transportation, estimated the costs of rehabilitation of the three most deteriorated bridges on the Debtor Railroad's Line at $1,497,000.00, subject to operating changes which would cause the need for such repairs to be diminished. The Debtor does not have funds for these projects, nor has it shown the ability to generate them.

The debtor began the year 1980 employing 59 people. (Transcript September 23, 1980, at 71). However, car loadings, the source of the Railroad's revenue, have shown an alarming rate of decline. In the first half of 1980, car loadings fell 21.7 percent over the corresponding figure for the first half of 1979. (Trustee's Petition filed August 22, 1980). More importantly, the debtor showed an $83,598.00 loss in the first quarter of 1980. (Financial statement annexed to Trustee's August 22, 1980 Petitions.) Total railway operating revenue was $507,455.00 for the first quarter of 1980; if this figure is annualized, the railroad could be expected to gross only $2,029,816.00 from operations in 1980.

With these negative financial factors at work, and consistent with the earlier mandate of this Court in Orders 81 and 83, the Trustee undertook the liquidation of the debtor. Efforts by the Trustee and the NJDOT produced bids for assets of the Debtor in various forms. After hearings and careful consideration, this Court found the bid of the Delaware Otsego Corporation ("DO") to be the most favorable offer as far as the estate and its creditors are concerned.

On August 5, 1980, this Court entered Order 104, which approved the contract between the Trustee, the offeror, DO, and its new subsidiary, the New York Susquehanna & Western Railway Corporation ("New NYS&W"). That agreement provides in pertinent part that the New NYS&W would purchase from the Trustee certain of the debtor's abandoned rail assets which were being liquidated. New NYS&W was incorporated on March 17, 1980, and prior to its takeover of the debtor's line of September 2, 1980, New NYS&W had never operated as a carrier. (August 1, 1980 Agreement of Sale, ¶ VI(B), Exhibit A to Trustee's Petition for Approval of Contract filed August 1, 1980) (hereinafter "Agreement").

One of the conditions precedent to closing under the Agreement is the receipt of final judicial and regulatory approval of the transaction, without conditions materially increasing the cost of the transaction to DO and New NYS&W. This term includes specifically any conditions requiring DO or New NYS&W to make any payment to any employees of Susquehanna, DO or New NYS&W other than those specified in the Agreement. Agreement, paragraph X(b).

Based upon the foregoing facts and the legal analysis which follows, the conclusion is inescapable that the transaction before the Court constitutes a complete abandonment of the debtor's rail line and a total termination of service. This course was ordered by this Court long before any entity manifested to this Court an interest in obtaining operating control of any portion of the debtor's line. This transaction does not constitute a "sale or transfer" within the meaning of any applicable statute or regulation. The Trustee does not simply "abandon his abandonments," *see In re Chicago, Milwaukee, S.P. & P.R. Co.*, No. 77-B-8999 (N.D. Ill., filed 2/29/80); he is under a fiduciary duty to reduce to money the property of the estate, for distribution to creditors. Hence, this abandonment is followed by, and is part of, a liquidation of the debtor, it is not a sale or trans-

fer. The Trustee is bound to abandon this line and to terminate all service regardless of whether the transaction with the new carrier is accomplished. That the liquidation of this estate may involve the conveyance of a portion of the debtor's assets to a single entity which will attempt to provide rail services does not negate the fact that in July and August 1979, this Court adjudicated the debtor unreorganizable and ordered cessation of operations and liquidation. Authority to effectuate abandonment of operations and cessation of service was bound to be pursued by the Trustee whether the assets were sold piecemeal or in bulk. The Trustee's sale to the New NYS&W does not transmute into a sale or transfer the proceedings leading to the issuance of authority to abandon.

It is clear that section 17(a) of the Milwaukee Act, and not Section 17(b), applies to this case; the ICC has so held, *Trustee's Exemption.* Further, The [*sic*] Milwaukee Railroad reorganization court has held that § 5(a) of the Milwaukee Act (the analogue of section 17(a) applicable specifically to Milwaukee), rather than section 5(b), dealing with the sale or transfer of lines of the Milwaukee Railroad, applies where the Trustee is engaged in the conveyance to a non-carrier (such as New NYS&W) of lines to be abandoned. *In re Chicago, Milwaukee, S.P.&P.R. Co.,* No. 77-B-8999 (N.D. Ill., filed 2/29/80, slip op. at 4-5).

This case clearly involves the total abandonment of the debtor's rail service by the Trustee. "Discontinuance of operations by the Trustee is abandonment", *Smith v. Hoboken Railroad, W. & S.C.,* 328 U.S. 123, 130 (1946), which "unlike an embargo, is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *ICC v. Chicago & Northwestern Transportation Co.,* 533 F.2d 1025, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pacific Railway Company,* 501 F.2d 908 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

Thus, in the context of this proceeding, the orders entered herein and the steps taken to dispose of the property of the estate in an orderly liquidation, it is clear that an abandonment procedure has been followed and not a sale or transfer. Insofar as the total abandonment procedure is incorporated in the Plan, this Court hereby approves and authorized [*sic*] such abandonment of the estate's properties.

Mandatory vs. Discretionary Labor Protection

We turn now to consideration of the labor protection issue in an abandonment setting. The financial condition of the debtor has worsened, with one important exception, throughout the course of these proceedings. In mid-1979, in an effort to arrest the decline, and to attempt to formulate an income-based plan of reorganization, NJDOT hired the railroad consulting firm of L.E. Peabody and Associates (hereinafter "Peabody"). Peabody submitted a number of reports to this Court, portions of which have particular relevance to the issues before this Court at this juncture. These reports, the Trustee's attempts to implement the recommendations contained therein, and the results of the Trustee's efforts, establish that the financial problems of this Railroad are based in large part on the fact that the Trustee has been compelled to operate in accordance with certain collective bargaining agreements which provide for uneconomical staffing of the Railroad.

In its June 18, 1979 report on Institutional Alternatives to Service, Peabody analyzed the debtor's manning requirements, and concluded that, as of May 9, 1979, the debtor was significantly overstaffed. (Page 9). Peabody recommended certain personnel changes be instituted in an effort to cut costs.

Thereafter, the Trustee began to take steps to implement the "rationalization" of the debtor, as recommended by Peabody, which included lay-offs and relocation of various

railroad personnel. (Trustee's Petition for Extension of Time to File a Plan, filed June 22, 1979; Transcript, July 2, 1979, at 9-11).

In its August 9, 1979 Analysis of Current Operations, Peabody noted that "a significant amount of over-staffing and under-utilization of personnel was found to exist on the NYS&W." (Page 2). Peabody suggested a general restructuring of the labor force, including the elimination of 27 jobs, the functions of which would be replaced by 7 jobs. The 7 jobs created were managerial; and Peabody, therefore, recommended, as a cost reduction strategy, the termination of from 18 to 20 contract employees. As envisioned by Peabody, the "rationalized" debtor would require only 52 employees, assuming its traffic volume produced revenues of $2,549,000.00. (August 9, 1979 Institutional Alternatives Report, pp. 9-13).

The management of the debtor reported on August 15, 1979 that employee terminations had resulted in cost savings that were expected to be improved by additional and continued lay-offs and job abolishments. (Transcript, August 15, 1979, at 14, 44-45). Thus, it is clear that the debtor began reducing its work force as early as June 1979, pursuant to recommendations of the Peabody management consulting firm and the NJDOT, in an effort to reorganize on a income basis. Although the debtor showed less of a loss in 1979 ($170,845.00) than in previous fiscal years during this proceeding, unfortunately management's efforts were not sufficient to make this railroad profitable. It is significant to note, however, that attempts to rationalize the labor force led to the debtor's best financial performance.

Losses, while reduced, nonetheless continued to reflect the inability of this railroad to turn itself around. As indicated above, gross revenues were also declining to an annual figure of approximately $2,000,000. The Peabody report assumed that with only 52 employees, profitability could be achieved, *provided* gross revenues remained in the

range of $2,500,000. Thus, even as rationalization proceeded, the assumptions underlying the Peabody analysis were undercut.

Testimony adduced at the September 23 hearing confirms the fact that less employees are needed as the volume of business declines. Although the debtor had only 25 employees as of August 29, 1980, it was able to accomplish this 58 percent reduction of its work force over a period of 9 months with no adverse impact on its operational capacity. This reduction of approximately 34 employees from January to September 1980 was possible through significant attrition in the clerical area, additional mechanization within the track maintenance department, and the general decline in business.

Of the 25 persons employed by the debtor on August 29, 1980, 23 were hired by the New NYS&W. One employee died over the Labor Day weekend; consequently, only *one* of the people employed by the Trustee on the date he ceased operation was not hired by the new carrier. That person not employed by New NYS&W is receiving benefits from Delaware Otsego.

By posting of notice, or publication, well in advance of August 29, 1980 every employee knew or should have known of the pending negotiations between the Trustee and various interested parties, and the likelihood of the sale of the debtor's abandoned line to a new carrier.

In addition, RLEA had actual knowledge of events as they transpired by reason of its active participation in this proceeding. Despite this fact, there is no proof that RLEA ever made formal demand on either the Trustee, Delaware Otsego, or New NYS&W to engage in collective bargaining on the various aspects of termination of existing employees and reassignment of forces to the new carrier. Were RLEA, or any other responsible labor organization to have made such a demand, it seems unlikely that numerous individual

employees would have felt it necessary, prior to August 29th, to initiate contact with the Trustee regarding either separation settlements, or their continued employment by the new carrier. As a result of those negotiations, and after being advised that the cash received from the Trustee or Delaware Otsego would be in full settlement of any and all claims which they could have against either the Trustee or Delaware Otsego, between 15 and 18 employees executed documents which on their faces appear to be general and complete releases of all of their claims. See Exh. T-1 and T-2. These releases are valid in all respects, and there is no evidence that they were not knowingly and willingly executed by the releasors. None of the employees who negotiated with the Trustee about settlement and separation complained of the results reached.

The aforementioned employees who executed releases left the Trustee's employment voluntarily, and in so doing, manifested an unwillingness to work for the new carrier.

In July 1980, for the first time in 15 years the Railroad required physicals of all employees; those employees averaged 50 years of age. To require physicals is not a violation of any collective bargaining agreement which has been placed before the Court; rather, such physicals are, according to an employee-witness, a beneficial way to ensure the safety of employees performing physical labor. Three of the existing employees failed the physical; one was subsequently restored after one day, but then voluntarily left the Trustee's employ and executed a release. Thus, two employees were terminated in July, 1980, for failing the physical.

Although the job titles of the debtor's former employees may have changed, their duties have not. No employee is performing work which he would rather not do, or that is beyond his physical capacity. Hourly wage rates of the employees of the new carrier are equal to or higher than those paid by the Trustee. New NYS&W does not pay time

and one-half for overtime. However, all fringe benefits are provided by the new carrier, and are equal to, or superior to those which were provided by the Trustee.

Former employees of the debtor are being given priority in filling positions on the new carrier which may be required in connection with rehabilitation of the line.

In light of the foregoing, this Court must evaluate the necessity for imposing labor protection conditions upon the estate. This analysis shall proceed in the context of the conclusion previously reached that the disposition of the assets of the debtor constitutes a court-authorized abandonment consistent with Section 17(a) of the Milwaukee Act.

The Milwaukee Act shifted the authority over the issue of labor protection from the ICC to this Court. Both section 17(a) of the Milwaukee Act, dealing with abandonments, and section 17(b) of the same Act, dealing with the sale or transfer of lines, provide that a reorganization court shall see to it that employees are protected according to 49 U.S.C. 11347. Contrary to this Court's conclusion that this case is a section 17(a) abandonment, RLEA contends that section 17(b) of the Milwaukee Act applies to this case, and that the minimum level of labor protection which this Court must apply are those standards articulated in *New York Dock R. Co. v. United States*, 609 F.2d 83 (2nd Cir. 1979), or *Oregon Short Line Railroad—Abandonment*, 360 I.C.C. 91 (1979).

Discussion of the statutory framework governing this case is somewhat complicated by the codification and restatement, without substantive change, of the Interstate Commerce Act, P.L. 95-473 (October 17, 1978), 49 U.S.C. 10101 *et seq.* Under that statute, applications to abandon a line of railroad were filed with the Commission under 49 U.S.C. 10903, which was formerly section 1 (18) of the Act. On the other hand, applications for consolidation,

merger or purchase of property of a carrier by another carrier were filed under 49 U.S.C. 11343, which was formerly section 5(2) of the Act. 49 U.S.C. 11347, referred to in the Milwaukee Act as the statute to which this Court should look for guidance in the area of labor provisions, on its face applies only to the "consolidation/merger" type of case, initiated under 49 U.S.C. 11343 (formerly section 5(2) [*sic*].

The policy behind the important distinction between abandonments and consolidation/merger cases was explained by the Interstate Commerce Commission in *Okmulgee Northern Railway Company Abandonment*, 320 I.C.C. 637, 639-640 (1964):

> The congressional purpose in enacting section 5(2)(a) in its present form was to facilitate voluntary merger and consolidation in the national transportation system. *County of Marin v. United States*, 356 U.S. 412, 416-418 (1958). As indicated by the history of the legislation, Congress was much concerned with the survival of railroads that were in weak condition and with the steps which might be taken to promote carriers survival. The great dependence previously placed on competition among railroads to invigorate our railroad economy, was to be moderated where necessary for such survival, and, in the interest of the maintenance and development of an economic and efficient railroad system, consolidation was to be made easier. . . That section 5 contemplates rail merger and unification of properties and operations as a step in continuing the enterprise as distinguished from situations where, as here, the one carrier is abandoning its entire line and operations is made clear by the decision in *Schwabacher v. United States*, 334 U.S. 182 (1948) . . . As distinguished from section 5(2) which governs the unification of continuing enterprises, section 1 (18) was intended and designed to cover abandonments, acqui-

sitions and extensions of lines of railroad. 320 I.C.C. 639 - 640.

The total cessation of operations and liquidation ordered by this Court is a complete abandonment. *I.C.C. v. Chicago & Northwestern Transportation Co., supra; I.C.C. v. Chicago, Rock Island & Pacific Railway Company, supra.* Does an abandonment carry with it the mandatory requirement that labor protection conditions be imposed? The answer appears to be clearly: No.

Rather than being required to do so, this Court has discretion whether or not to impose labor protection provisions. *In re Chicago, Rock Island & P.R. Co.*, No. 75-B-2697, Order No. 248 (N.D.Ill. filed June 2, 1980). In the exercise of its discretion, it is appropriate for the Court to consult ICC rulings issued while that agency had authority over the issue of labor protection, in determining the standards and factors to be applied to a total abandonment of a carrier. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Leigh & N.E.R. Co. v. I.C.* [*sic*], 540 F.2d 71, 80 (3d Cir. 1976). As will become apparent, in cases of total abandonment, prior to the passage of the Milwaukee Act, the ICC had consistently refused to impose any labor protective provisions at all. Further, after passage of the Milwaukee Act, the only Court faced with the issue has also refused to impose labor protection in a case of total abandonment, such as obtains in the within matter. *Rock Island, supra.* For the reasons which follow, no labor protection will be imposed in this case, upon either the Trustee, the New NYS&W or Delaware Otsego.

The ICC has characterized abandonment applications under former section 1 (18) of the Interstate Commerce Act, (which would be applicable here but for the passage of the Milwaukee Act), as falling into three general groups:

(1) Abandonment of entire properties by carriers which are no longer able to continue the struggle for

> survival because of highway competition or other conditions depriving them of sufficient means of livelihood; (2) Partial abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines; and (3) Abandonment of main lines, branch lines, or parts of lines by carriers, not *in extremis*, where abandonment is warranted and desirable as a benefit to the transportations system, but, in the language of the court, results also in a private benefit for the railroad in the form of savings realized by discontinuing uneconomic service. *Chicago, A. & S. R. Receiver Abandonment*, 261 I.C.C. 646, 651 (1956).

The distinction between partial and total abandonments has been recognized as important by this Court and other Courts, in the related situation where creditors assert their *Brooks-Scanlon*[2] rights. See July 12, 1979 Opinion; *In re Central Railroad of New Jersey*, 485 F.2d 208, 214 (3d Cir. 1973), *cert. denied sub nom; Timpany v. New Jersey*, 414 U.S. 1131 (1974); *In re Erie Lackawanna Railway Company*, 517 F.2d 893, 898 (6th Cir. 1975); *In re New York, New Haven & Hartford Railroad Company*, 304 F. Supp. 793, 802 (D. Conn. 1969), *modified* 399 U.S. 392 (1970); *Brooklyn Eastern District Terminal v. United States*, 302 F.Supp. 1095 (E.D.N.Y. 1969). In the *Central Railroad* case, the Third Circuit specifically distinguished the *Brooks-Scanlon* line of cases based on the fact that Jersey Central only sought partial abandonment. 485 F.2d at 214. This Court in turn distinguished *Jersey Central*, in favor of *Brooks-Scanlon*, on the ground that this debtor's situation involved a complete abandonment and total termination of service. July 12, 1979 Opinion, at 2, *aff'd*, ——— F.2d ——— (3d Cir. 1980).

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[2] *Brooks-Scanlon Company v. Railroad Commission*, 251 U.S. 396 (1920).

In abandonment proceedings under former section 1(18), the ICC has consistently had discretionary authority over the imposition of labor protective conditions. *ICC v. Railway Labor Executives [sic] Association,* 315 U.S. 373 (1942). However,

> [i]n a proceeding where a carrier proposes to abandon its entire line of railroad, the imposition of protective conditions normally is not warranted, and would not serve, in most instances, to strengthen the transportation system within the contemplation of the national transportation policy. A departure from this principle in particular cases must be supported by clear and convincing evidence. *Okmulgee Northen [sic] Railway Company Abandonment,* 320 ICC 637 (1964); *Manitee & Repton R. Co [sic] Abandonment,* 320 ICC 489 (1964); and *Tennessee Central Railway Company Abandonment,* 333 ICC 443 (1968).

Bush Terminal Railway Company Entire Line Abandonment, 342 ICC 34, 51 (1971).

In *Bush Terminal,* the ICC noted that although some employees would be adversely affected by abandonment, the railroad was in poor financial condition, current liabilities far exceeded current assets, it had a negative shareholder's equity and had been suffering operating losses for a number of years. "Employee conditions cannot reasonably be required in a case where the entire railroad of a carrier is permitted to be abandoned because it cannot make ends meet." 342 ICC at 51.

In *Tennessee Central,* the ICC found that the railroad was a bankrupt business entity unable to meet either its long term or immediate financial obligations; yet, that railroad had provided regular employment for its work force and had paid its employees in full satisfaction of the terms of the collective bargaining agreements. In such circumstances, the Commission found it "neither equitable nor

warranted on any ground, to require continued operation for the purpose of providing jobs for the carrier's employees, or to require further consumption of the railroad's properties for the payment of employees after the railroad ceases operation." 334 ICC at 545. Although the Tennessee Central was current in wage payments to its employees, there is no meaningful distinction between that case and the one at bar, as the scheduled wage increases due under collective bargaining agreements have been accrued, and are to be satisfied as priority claims under the Plan. The debtor has been paying its employees throughout this proceeding while the interests of other parties have suffered constant erosion.

It should be noted that one of the pre-conditions to the Trustee—New NYS&W—DO contract is the non-imposition of labor protection; thus, if labor protection is imposed on either New NYS&W or DO, the transaction will not occur, and the debtor's former employees now employed by New NYS&W would lose their jobs and still be without protection. This fact is pertinent to the Court's consideration of whether or not labor protection is warranted. *See Chicago, R,[sic]I.P. Acquisition,* 290 ICC 696, 699 (1955).

RLEA contends that the discretion which the ICC exercised in determining whether to impose labor protection in cases of abandonment was eliminated by passage of section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 ("4 R Act"). However, this argument flies in the face of post-4 R Act ICC decisions denying labor protection in total abandonments, and is therefore clearly without merit.

Section 802 of the 4 R Act (90 Stat. 127) was added to the Interstate Commerce Act as section 1a in 1976. Recodification of the Interstate Commerce Act in 1978 accomplished the repeal of section 1a and the placement of that section in new 49 U.S.C. § 10903. RLEA suggests that the language of 49 U.S.C. 10903(b) (2) operated to deprive

the ICC of the discretion over labor protection which it had formerly exercised in cases of complete abandonment. The ICC, however, consistently rejected RLEA's argument in post-4 R Act cases.

In *Wellsville, Addison and Galeton Railroad Corporation —Abandonment of Entire Line,* 354 ICC 744 (1978) the only issue was the imposition of employee protective conditions in the abandonment of an entire line of railroad. In a prior decision in the same case, the Commission had imposed the Oregon Short Line Conditions on the petitioning carrier. *Wellsville, Addison & Galeton Railroad Corp.— Abandonment,* 354 ICC 247 (1978).

On the carrier's petition to the Commission on an issue of general transportation importance, the ICC re-opened the proceeding, and reversed its prior ruling that the Oregon Short Line protections applied to total abandonments. In so doing, the Commission held:

> The precise language of section 1a(4) of the Act [now 49 U.S. 10903(b)(2)] would appear to require imposition of employee protective conditions in all permitted abandonments. However, the legislative history of the 4 R Act and prior Commission precedent is clearly to the contrary. In the report of the Committee of Conference on the Railroad Revitalization & Regulatory Reform Act of 1976, H.R. Report 94-781, p.218-19, Congress indicated that the precise language of section 1a(4) was not intended to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company.
>
> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of [*sic*] employees after the railroad ceases operations. *Okmulgee North-*

ern Railway Company Abandonment, 320 ICC 637 (1964); *Tennessee Central Railway Company Abandonment,* 333 ICC 443, 454 (1968).

Wellsville, 354 ICC at 746.

In *Northampton & Bath Railroad Company Abandonment,* 354 ICC 784 (1978) the Commission again was faced with the issue whether employee protective conditions should be imposed in an entire line abandonment. In *Northampton & Bath,* RLEA offered the same argument which it makes to this Court, to wit, that section 1(a)(4) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act) requires the imposition of employee protective conditions in an entire line abandonment. 354 ICC at 785. In *Northampton & Bath,* the Commission relied on *Wellsville, supra,* and the legislative history of the 4 R Act, and reaffirmed its determination that despite passage of the 4 R Act,

> Congress did not intend to curtail the Commission's discretion regarding protective conditions in entire line abandonments.
>
> After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease. The conditions imposed by the review board, those developed in Oregon Short Line, are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continues operations similar to its own.

354 ICC at 785-786 (footnotes omitted).

There is additional pertinent legislative history which supports that relied upon by the Commission in the *Wellsville* and *Northampton* decisions. Senate Conference Report No. 94-595, a joint statement of the House and Senate managers of the 4 R Act, (see 2 U.S. Code Cong. & Admin. News 148 (1976)) states that new section 1a of the Interstate Commerce Act (now 49 U.S.C. 10903)

> required employee protection no less beneficial than that established under section 5(2)(f) of the Interstate Commerce Act. [*sic*] and section 405 of the Rail Passenger Service Act *but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company.*" (Emphasis Added)

2 U.S. Code Cong. & Admin. News 233 (1976).

Furthermore, the ICC has qualified the applicability of the Oregon Short Line conditions in a ruling issued in that very proceeding. *Oregon Short Line Railroad and Union Pacific Railroad Company—Abandonment* (Goshen Branch) 360 ICC 666, 667 (1980). In that decision, the Commission noted that the Oregon Short Line conditions, 360 ICC 91, which RLEA has asserted apply to this case "*will apply in all rail abandonment proceedings, except for entire line abandonments.*" (Emphasis added) 360 ICC at 667. Of course, the *New York Dock* conditions *a fortiori* do not apply here, as *New York Dock* involved a section 5(2) case, of the merger/acquisition type.

With the important distinction between partial and total abandonments established, *People of the State of Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979), cited by RLEA for the proposition that the ICC was deprived of the discretion whether to impose labor protection after the 4 R Act, is proven to be inapplicable to the facts of the instant case. *People of Illinois* dealt with the Baltimore and Ohio Railroad's application to abandon only a 73.27 mile branch

line; it did not involve the complete abandonment of B&O's entire system. Therefore, the quotation relied upon by RLEA (Memorandum, p. 13) is nothing more than *dictum*, and has no application to a case of total abandonment, such as the within matter. *See Oregon Short Line*, 360 ICC at 667. It is clear that the *People of Illinois* Court was not addressing the issue before either this Court, or the *Rock Island, supra,* reorganization court.

The Milwaukee Act, which shifted the authority over labor protection issues from the Commission to the reorganization court "intends to make no change in existing law as it affects employee protection." H.R. Conference Rpt. No. 76-583, 1979 U.S. Code Cong. & Admin. News 3333; *Rock Island*, No. 75-B-2697, Order No. 248; *ICC Report, Chicago, Rock Island and Pacific Railroad Company—Abandonment—Entire System*, Docket No. AB-46 (Sub No. 22) (May 23, 1980); (*"Rock Island Abandonment"*) *see Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, No. 77-B-899 [*sic*] (U.S. District Court, Northern District of Illinois, filed February 29, 1980).

In *Rock Island Abandonment*, the ICC recommended to the reorganization court that the Trustee of that railroad be permitted to abandon all lines and discontinue all operations. In discussing the question of labor protection, the ICC noted that although the New York Dock conditions could be imposed on the Rock Island, "another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of empolyee protective conditions not to be warranted." *Rock Island Abandonment*, at 16-17.

The question of what, if any, labor protection should be imposed in a complete abandonment under the Milwaukee Act came before the District Court with jurisdiction of the Rock Island. After noting that Rock Island's unconditional

discontinuance of service and its total system abandonment was [*sic*] constitutionally mandated under the *Brooks-Scanlon* doctrine, the court ruled that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to section 17 of the Milwaukee Act. The court relied on Rock Island's system-wide termination of operations and total line abandonment, "which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance." *Rock Island*, Order No. 248. The *Rock Island* court found that ICC precedent, the Rock Island's constitutional right to abandon its lines and discontinue its service, and the equities of the situation all mitigated against the imposition of labor protective arrangements.

The facts of *Rock Island* are strikingly similar to the circumstances which obtain here. This Court also has held that it was constitutionally impermissible for this debtor to continue operations, and ordered abandonment and cessation of service. Since January of 1976, this estate has continuously suffered operational losses which have eroded the collateral of creditors; nevertheless, employees have continued to be paid. Furthermore, those employees are asserting claims for unpaid wage accruals as priority expenses of administration, which, if allowed, must be paid out of the collateral of the secured creditors. This is a total system abandonment, and no parent or affiliate of the abandoning carrier will reap the benefits of the abandonment. Consistent with all existing precedent on this point, the imposition of labor protective provisions on the estate of this debtor is not warranted.

The recently enacted Staggers Rail Act of 1980, deregulating certain aspects of the railroad industry, does not affect the foregoing legal analysis regarding labor protection. In fact, the legislative history of the Staggers

Act makes it clear that in an abandonment setting, Congress did not intend to impose labor protection conditions on a Class III carrier such as the debtor was, or DO and New NYS&W are. In a discussion of the Staggers Act in the House, the following colloquy occurred:

> Mr. Lee: Mr. Chairman, in the Stagger-Rahall-Lee amendment, there is clarification of congressional intent with regard to abandonments under the Milwaukee Act. There is one ambiquity in the language that I would like to have clarified at this time.
>
> The amendment refers to "major" rail carriers. It is my understanding that the thrust of this amendment is to address the specific situation in the Midwest which gives rise to the Milwaukee and Rock Island Acts. The word "major" does not have a specific meaning in the law and history of the Interstate Commerce Commission. I understand that this amendment is directed to major or larger carriers—that is, class I carriers such as the Rock Island. Is my understanding correct?
>
> Mr. Florio: The gentleman is correct.
>
> Mr. Lee: I thank the gentleman from New Jersey. There is a great deal of law and legislative history and administrative history relating to the subject of labor protection. My major involvement in this legislation has been to insure that the small class II and class III carriers who are such an important part of our national railroad system will benefit and not be harmed by deregulation legislation. With much of our railroad industry in trouble, one answer in continuing service on troubled major railroads is going to be development of light density railroads. One carrier that operates in upstate New York, northern Pennsylvania and northern New Jersey, the Delaware Otsego System, operates several lines as independent shipper controlled railroads that would otherwise be lost to the rail system. Our congressional policy is to encourage transactions

involving class III carriers especially in situations where the alternative to continuation of service may well be liquidation of service.

Because of the importance of this segment of our railroad system, I feel it is important to clarify that this amendment is making reference to abandonment of class I rail carriers and that the Milwaukee Restructuring Act was intended to impose employee protection on such abandonments and not in cases where there has not traditionally been such protection. I was prepared to offer an amendment to clarify this point, but if the gentleman can assure me that my understanding is correct, I will not offer the amendment.

Mr. Florio: The gentleman's understanding is correct on the purpose and intent of this amendment.

Mr. Lee: I thank the gentleman. Mr. Madigan do you agree?

Mr. Madigan: I agree.

Mr. Lee: Thank you.

Congressional Record, September 9, 1980, at p. H 8555.

This history of the Staggers Act only reinforces this Court's conclusion that imposition of labor protection provisions in this case is unwarranted.

For the foregoing reasons, RLEA's request for the imposition of labor protective provisions upon any party (including the Debtor, the Trustee and new NYS&W) is denied.[3] The Plan need not be modified to incorporate any

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[3] Having concluded that this Court, in its discretion, need not impose labor protection provisions, I need not reach other intriguing issues such as:

(a) are there any employees entitled to protection as "dis-

such provisions. The Trustee should submit an Order consistent with this opinion within seven (7) days.

/s/ LAWRENCE A. WHIPPLE
Lawrence A. Whipple
U.S.D.J.

DATED: NOVEMBER 18TH, 1980.

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placed" or "dismissed" employees adversely affected by the abandonment?

(b) were pre-August 29, 1980 layoffs justified?

(c) do the releases constitute a bar to any employee seeking labor protection relief or is this issue, as RLEA contends, one requiring arbitration?

(d) if labor protection provisions were imposed, what priority, if any, should be given to payments to protected employees? *See, e.g.*, Reading Company v. Brown, 391 U.S. 471 (1968).

APPENDIX C-1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. B-76-182

In the Matter of:
NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

ORDER APPROVING THE SECOND AMENDED PLAN OF LIQUIDATION

(Original Filed April 14, 1981)

This matter having been opened upon Notice to all parties in interest, of a hearing on the question of approval of the Second Amended Plan of Liquidation of the Debtor heretofore certified to the Court by the Interstate Commerce Commission in its Decision and Order dated December 22, 1980, and the Court having considered the objections lodged to said Plan, and the Court having further considered the record before the Court and before the Interstate Commerce Commission, as well as other proofs presented at the hearing held on March 24, 1981, and good and sufficient cause appearing for the making and entry of the within Order, and for the reasons set forth in an Opinion filed this date,

It is, on this 14th day of April, 1981,

ORDERED that the Second Amended Plan of Liquidation as certified to the Court by the Interstate Commerce Commission be and the same hereby is approved; and it is further

ORDERED that the Trustee shall, within twenty (20) days, mail to all members of class 6(c) a copy of the afore-

said Opinion, this Order, the I.C.C.'s Decision and Order dated December 22, 1980, a ballot, and a notice that acceptance or rejection of the Plan must be received by the Trustee within sixty (60) days; and it is further

ORDERED that the Trustee shall certify the results of the voting on the Plan to this Court, and the I.C.C., within fifteen (15) days after expiration of the sixty (60) day period.

/s/ LAWRENCE A. WHIPPLE
Honorable Lawrence A. Whipple
Sr. United States District Judge

APPENDIX C-2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Newark, N.J. 07101

Chambers of
Lawrence A. Whipple
Senior Judge

OPINION

(Original Filed April 9, 1981)

April 8, 1981

To All Attorneys of Record

RE: IN THE MATTER OF THE NEW YORK,
SUSQUEHANNA AND WESTERN RAILROAD COMPANY
B 76-182

Gentlemen:

This matter is before the Court for a ruling on approval of the First and Second Amended Plans of Liquidation ("the Plan") submitted by the Trustee of the New York, Susquehanna and Western Railroad Co. The Plan was certified to this Court by the Interstate Commerce Commission (ICC) on December 27, 1980.

On March 24, 1981 the Court conducted a hearing on whether to approve the Plan pursuant to a Notice of Hearing dated January 13, 1981 directed to all creditors, shareholders, indentured trustees and other interested parties.

Upon a review of the record before this Court, as well as the record before the ICC, the Court has concluded that the Plan should be approved. In accordance with the dictates of Section 77(e) of the Bankruptcy Act, 11 U.S.C. ¶[*sic*]204(e), this Opinion is issued to set forth the reasons for the Court's conclusion.

The Notice of Hearing directed that objections to the Plan be filed with the Court by March 17, 1981. Three

objections were filed in accordance with the Notice, and counsel for two of the objecting parties were present at the hearing and stated their objections on the record. In summary the objections were as follows:

1. The Railway Labor Executives' Association ("RLEA") objected because of the absence of labor protective provisions in the Plan;

2. The New Jersey Department of the Treasury objected basically because of the distinction between classes 2 and 3 in the Plan, and for other reasons relating to definitions within the Plan; and

3. A former employee of the debtor, Harry Downing, submitted a letter to the Court complaining that a release he gave the Trustee was the product of duress and harrassment. Mr. Downing did not appear at the hearing.

The Court finds as follows with respect to the objections:

1. RLEA's objection has previously been rejected by this Court in an Opinion dated November 28, 1980, which is presently the subject of an appeal before the Third Circuit Court of Appeals. No reason has been presented which would militate in favor of any modification of the November 28, 1980 decision.

2. The New Jersey Department of the Treasury's objections have been dealt with by the I.C.C. in its decision and Order. I find the I.C.C.'s treatment of those objections by the State to be valid and correct.

3. Mr. Downing's objection does not relate to any of the criteria which guides this Court in its decision whether to approve the Plan and accordingly need be addressed no further in this context.

Turning next to a consideration of the statutory criteria governing this Court's Ruling on the Plan, it must be noted that pursuant to Bankruptcy Rule 8-304, this Court is to render a decision based primarily on the record

before the I.C.C. The Advirsoy [*sic*] Committee's Note to Rule 8-304 suggests:

> Approval of the Plan by the Court involves review of the Commission's factual findings and legal conclusions . . . A de novo hearing before the Court is not contemplated. However, evidence relating to changed circumstances and compensation and reimbursement for necessary expenses within the limit fixed by the Commission may be reviewed at the approval hearing.

Advisory Committee Notes to Rule 8-304, Collier Pamphlet Edition, Bankruptcy Rules and Official Forms (Moller and King, Eds., 1979).

Where the I.C.C. has followed the proper legal standards, and there is substantial evidence to support its determination, those findings must be accepted by the Court. 5 Collier, *Bankruptcy*, ¶ 77.14, at 574 (14th Ed., 1978).

In determining whether to approve a Plan certified to it by the I.C.C., this Court is governed by Section 77(e), which provides in relevant part:

> The Judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by a corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Com-

> mission, and are within such maximum limits to be subject to the approval of the Judge; (3) The Plan provides for the payment of all costs of administration and all other allowances made or to be made by the Judge, except that allowances provides [*sic*] for in subsection (c), paragraph (12) of this section may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the Judge is hereby given power to approve the same.

I turn first to the question of whether the Plan complies with Section 77(b). That section sets forth three provisions which a Plan must contain. Under the statute, a Plan must: (1) include provisions modifying or altering the rights of creditors generally or any class of them; (2) provide for fixed charges in such amount that future earnings will be sufficient to cover same; and (3) provide adequate means for its execution.

The I.C.C. found that the Plan complies with Section 77(b), and I agree. The sale of all of the debtor's assets, free and clear of liens, with liens to attach to the proceeds, certainly affects creditors generally, by removing certain identifiable property from the reach of process, or from specific liens and encumbrances. Moreover, as detailed below, the rights of Class 6(c) and all classes junior thereto, are significantly altered.

Secondly, the requirement that the Plan provide for payment of "fixed charges" is inapplicable to the Plan here being considered, since the Plan contemplates liquidation of the debtor's assets.

Finally, with respect to execution of the Plan, the Court concludes that the sale of the debtor's assets to a subsidiary of the Delaware Otsego Corporation, as contemplated in the Plan, constitutes adequate means for the Plan's execution. Sale of the debtor's assets is specifically authorized by Section 77(b)(5) as one of the means for

execution of a Plan. The only limitation on the power to sell is that the sale be "at not less than a fair upset price." In this connection, I find that the liquidation value of $3,022,000 which appears in the Gross Appraisal, previously made a part of the record in these proceedings, would have constituted a fair upset price for the debtor's assets. The $5,000,000 to be received from the subsidiary of Delaware Otsego is well in excess of that figure and compares favorably with the value of $5,000,000 ascribed to the debtor as a going concern by the Gross Appraisal.

It appears to the Court that the Trustee and the Purchaser are proceeding with all deliberate speed toward a closing on the asset sale contract. That contract, of course, arose as the result of spirited bidding among three offerors for the debtor's assets. After numerous hearings and written submissions, this Court ruled in May of 1980 that Delaware Otsego's offer was fair, and was the highest and best offer for the assets of this esate. [*sic*]

The I.C.C., in a supplemental decision dated February 24, 1981 has authorized Delaware Otsego's subsidiary, The New York, Susquehanna & Western Railway Corp. to issue a bond to finance the payment of the purchase price to the Trustee. The facts presented thus clearly establish that there are adequate means for execution of the Plan.

Finally, Section 77(e) (¶ 1(S2)(3)) is satisfied, in that all costs of administration and other allowances shall be paid, pursuant to the distributive provisions of the Plan. For all the foregoing reasons, the Plan is approved, and procedures leading to confirmation shall commence.

The next issue before me is a determination of which classes of creditors and stockholders need vote on acceptance of the Plan. In essence, Section 77(e) provides that solicitation of acceptances from a class of creditors or stockholders is only necessary if the claims of such class have "value" and would be "adversely and materially affected" by the Plan.

At the hearing on Plan approval, the Trustee presented the testimony of Jerry Beasman, Comptroller of the Delaware Otsego Corporation. Mr. Beasman's testimony, and Exhibit T-2 marked in evidence at the hearing, establish that, based upon the books and records of the Railroad as of June 30, 1980, the liabilities to creditors in classes 1 through 5 (excluding class 2 administration creditors) total approximately $2,720,000. Classes 6(a) (Series A First and Consolidated Mortgage 4% Bonds) and 6(b) (Terminal First Mortgage 4% Bonds), including accrue [*sic*] interest to date, total approximately $1,014,300. Thus, there is a total due to classes 1 through 6(b) (excluding class 2), of approximately $3,734,300. According to the Railroad's books and record, the total claim of class 6(c) (General Mortgage 4½% Income Bonds) is $4,053,102, including accrued interest. Thus, it appears that the total dollar value of claims in classes 1 through 6(c) (excluding allowances to class 2) is $7,787,402.[1]

Mr. Beasman testified that as of June 30, 1980, the Trustee's assets consist of the following:

1. Cash—$1,776,969.
2. Accounts Receivable—$485,684.
3. Balance due from Delaware Otsego—$4,900,000.
   Total—$7,162,653.

Mr. Beasman testified that as of March 24, 1981, the estimated assets of the Trustee were as follows:

1. Cash—$2,092,595.
2. Miscellaneous Accounts Receivable—
   (Approximate)—$200,000.
3. Balance due from Delaware Otsego—$4,450,000.
   Total—$6,742,595.

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[1] Counsel for the Trustee advised the Court that the sum of claims filed in slightly greater than the liabilities as reflected on the debtor's books. The difference in claims versus book liability is not large enough to alter the conclusions reached herein.

The proof with respect to the cash value of assets available for distribution reveals that classes 1 through 6(b), (including class 2) will receive cash payments for the full value of their claims. Furthermore, the members of class 6(c) will receive less than 100% of the dollar value of their claims. This would appear to be the case, even if no monies were allocated to class 2. Thus, it appears that the estate will be totally exhausted by only a partial distribution to General Mortgage Income bondholders.

The above analysis reveals that the claims of all classes junior to 6(c) have no value, since distribution is to proceed in accordance with the absolute priority rule. And, *a priori*, the debtor is unquestionably insolvent, as the value of its assets is far less than even a portion of its total liabilities.

Submission of the Plan to a class of creditors for voting is not required, according to Section 77(e) (¶ 2)(¶ 4) "if the Plan provides for the payment in cash to such class . . . of an amount not less than the value of their claims" or if the interest of such class has "no value". Likewise, according to the same statute, submission of the Plan to stockholders for voting is not required if the debtor is insolvent.

Here it appears that members of classes 1 through 6(b) will be paid cash in an amount equal to their claims. Members of class 6(c), on the other hand, will be paid less than the full value of their claims. The claims of members of classes 6(d) and all those junior thereto have no value, as all assets will be depleted by distribution to the Income bondholders. Therefore, the only class of creditors which is materially and adversely affected by the Plan, and who need vote thereon, is the class of holders of the Series A General Mortgage Income Bonds. Of course, the clear insolvency of the debtor makes submission of the Plan to stockholders likewise unnecessary.

In sum, this Court finds that the Plan complies with Sections 77(b) ane [*sic*] (e) of the Bankruptcy Act, is fair and equitable, and should be approved as certified to the Court by the I.C.C. Only the members of class 6(c) are materially affected by the Plan, and entitled to vote thereon. The Trustee shall therefore within twenty (20) days of the entry of an Order conforming to this Opinion, mail to each member of the affected class, a copy of this Opinion and the accompanying Order, and the Interstate Commerce Commission decision and Order dated December 22, 1980.[2] Also included in that mailing to voting creditors shall be a ballot and a notice that the creditors' acceptance or rejection of the Plan must be received by the Trustee within sixty (60) days of the date of said Notice, in order for that vote to be counted.

The Trustee shall certify the results of the voting on the Plan to this Court and the I.C.C. within fifteen (15) days after expiration of the sixty (60) day voting period. Thereafter, the Court shall schedule a hearing on confirmation. It is anticipated that all parties who intend to apply for allowances as class 2 administrative creditors shall do so no later than the expiration of the voting period. Of course, the I.C.C. shall be included in the process of granting administrative allowances, for the purpose of determining maximum limits.

The counsel for the Trustee shall submit an appropriate order within five (5) days of receipt of this opinion.

Very truly yours,

/s/ Lawrence A. Whipple
Lawrence A. Whipple
U.S.D.J.

LAW:jap

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[2] The Plan, which accompanied the Notice of Hearing has already been provided to all parties in interest.

APPENDIX D

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28098 (Sub-No. 1)[1]

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, DEBTOR (WALTER G. SCOTT, TRUSTEE)—PLAN OF LIQUIDATION

Decided December 22, 1980

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1. Plans of liquidation of bankrupt rail carrier found to meet the requirements of section 77 of the Bankruptcy Act, 11 U.S.C. 205.

2. Application for a certificate authorizing the acquisition and operation of the bankrupt carrier's railroad lines pursuant to 49 U.S.C. 10901 approved.

3. Application pursuant to 49 U.S.C. 11301 to issue securities and to assume obligations approved.

CERTIFICATE, DECISION AND REPORT

BY THE COMMISSION:

Background

The New York, Susquehanna and Western Railroad Company, debtor (Walter G. Scott, trustee) (Susquehanna, trustee, or debtor) is a railroad serving a number of industries in northern New Jersey and northeastern Pennsylvania. It has been in reorganization under section 77 of

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[1] This decision embraces Finance Docket No. 29421, The New York, Susquehanna and Western Railway Corporation—Purchase—New York, Susquehanna and Western Railroad Company, Debtor, (Walter G. Scott, Trustee) and Finance Docket No. 29422, The New York, Susquehanna and Western Railway Corporation—Securities Issuance.

the Bankruptcy Act (11 U.S.C. 205) since January 20, 1976, in the United States District Court for the District of New Jersey (court), No. B-76-182, *In the Matter of New York, Susquehanna and Western Railroad Company, Debtor.*

On January 2, 1980, the trustee filed an application for abandonment and discontinuance of service in accordance with section 17(a) of the Milwaukee Railroad Restructuring Act, Public Law 96-101, 93 Stat. 736 (1979) (MRRA) and the Commission's rules at 49 CFR 1121 Subpart F. Susquehanna sought to abandon its line extending from milepost 0 at Croxton Yard (Jersey City), Hudson County, NJ in a generally northwesterly direction to milepost 59.9 at Sparta Junction, Sussex County, NJ. The Susquehanna also has three branches extending from its main line which it proposed to abandon. They are the Edgewater Branch extending from Little Ferry Junction, NJ at milepost 0 to Edgewater, NJ at milepost 6.0; the Passaic Branch extending from milepost 0 at Passaic Junction, NJ at milepost 3.1; and the Lodi Branch extending from milepost 0 at Hackensack, NJ to milepost 2.4 at Lodi, NJ. Susquehanna also proposed to abandon the line owned by its subsidiary, the Susquehanna Connecting Railway Company, extending from milepost 0 at Suscon, PA to milepost 5.0 at Hillside Junction, PA (called the Suscon Branch). The Suscon Branch is currently being operated by Consolidated Rail Corporation (ConRail).

While the abandonment was pending before us, in an opinion dated May 28, 1980, the court found, after reviewing various offers to purchase Susquehanna's assets, that the offer of the Delaware Otsego Corporation (DO) would best serve the interests of the debtor's estate.

By Order No. 103, dated June 30, 1980, the court required the trustee and DO to complete all filings and submissions to the Commission for termination of service on the Susquehanna and an application for authority for DO to acquire and operate the Susquehanna's lines. The Commission was

also ordered to submit a report within 30 days of these filings.

By letter of July 11, 1980, the trustee updated its application for abandonment. On July 14, 1980, the New York, Susquehanna and Western Railway Corporation (NYS& W), a subsidiary of DO, filed two applications with the Commission. In one, it seeks a certificate of public convenience and necessity pursuant to 49 U.S.C. 10901 authorizing the acquisition and operation of the lines of railroad being abandoned by the Susquehanna.[2] In the other, pursuant to 49 U.S.C. 11301, it seeks authority to issue securities.[3]

By decision served August 12, 1980, in AB-210 (Sub-No. 1), *New York, Susquehanna and Western Railroad Company and Susquehanna Connecting Railway, Debtor (Walter G. Scott, Trustee)—Abandonment,* decided August 12, 1980, we found that the Susquehanna was not profitable and that the burden of continued operations outweighed the harm to the shippers and communities on the lines. Accordingly, we recommended to the court that the trustee be permitted to abandon the Susquehanna's lines. We also found that this proceeding is governed by the MRRA and that the court has authority under section 17(a)(1) of the MRRA to impose employee protective conditions if it decides to authorize the abandonment.

In another order, Order No. 101, dated June 10, 1980, the court directed the trustee to submit its so-called Amended Plan of Liquidation to this Commission. In compliance with the court's order, the trustee filed, on September 8, 1980, the

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[2] Assigned Finance Docket No. 29421, *The New York, Susquehanna and Wester · Railway Corporation—Purchase—New York, Susquehanna an Western Railroad Company, Debtor (Walter G. Scott, Trustee).*

[3] Assigned Finance Docket No. 29422, *The New York, Susquehanna and Western Railway Corporation—Securities Issuance.*

First Amended Plan of Liquidation and the Second Amended Plan of Liquidation (called the First Plan and the Second Plan, respectively). The court's order directed us to submit our comments on the trustee's Plans within 60 days after all interested parties had been served with the Plans. By Order No. 108, dated November 3, 1980, the court extended the due date for our comments to December 29, 1980.

Section 77(d) of the Bankruptcy Act provides that, after a plan of reorganization has been filed, the Commission must give notice to stockholders and creditors, hold public hearings, and render a report and order approving a plan which will meet the requirements of section 77(b) and (c) and be compatible with the public interest, or disapprove all plans. In view of the requirement of section 77(d) and the interrelationship between the trustee's Plans and NYS&W's acquisition and operation proposal and proposed securities issuance, we have consolidated the three proceedings, and requested comments from interested parties.[4]

Plans of Liquidation

First Plan.—The First Plan supersedes the preliminary Plan of Liquidation previously filed by the trustee with the court but not with the Commission. The First Plan generally envisions the cessation of operations and liquidation of the Susquehanna, but a continuance of service by a successor carrier unrelated to the debtor.

The classification of creditors and of stockholders is set out in article III, as follows:

* * * *

Article VI sets out a continuation of the debtor railroad's operations through a successor carrier. The trustee will accept the best offer from a party, not related to the debtor,

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[4] This request was published in the Federal Register, at 49 F.R. 70339, on October 23, 1980.

who will acquire all of the physical assets of the Susquehanna and who will provide service over the Susquehanna's tracks, serving all of the railroad's current shippers. All railroad employees other than a "skeleton" office staff will be terminated and no employee protection is contemplated since the railroad is being abandoned. The proceeds of the sale attributable to assets subject to mortgages, liens, and security interests shall be placed in a special account for distribution to those secured creditors.

The Plan describes in general outline the means for its execution, but does not specifically set out the terms and conditions of execution. Generally, the trustee is empowered to supervise the consummation of the Plan subject to the approval of the court. The trustee is empowered specifically to take such steps as may be advisable to effect execution of the Plan.

Second Plan.—The Second Plan amends the First Plan in several respects. First, it adds post-petition interest on prepetition taxes owing to class 5 claimants; second it changes the proposed date for termination of operations; and third, it establishes that within 6 months of the commencement of the interim occupancy agreement between the trustee and the NYS&W, the trustee will file with the court a list of Susquehanna's executory contracts to be rejected. (The First Plan required a 90-day time frame for such filing.) Additionally, the Second Plan indicates that the trustee has entered into an agreement with DO and its wholly owned subsidiary NYS&W, whereby the NYS&W will acquire the physical assets of the Susquehanna and will operate rail freight service over its lines subject to regulatory approval.[6]

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[6] A petition filed by DO in Finance Docket No. 29444, *Delaware Otsego Corporation, Control of New York, Susquehanna & Western Railway Corporation—Petition for Exemption Under 49 U.S.C. 10505 From 49 U.S.C. 11343-11347* is pending before the Commission.

Comments of parties on the Liquidation Plans.—The Railway Labor Executives' Association (RLEA) objects to the trustee's Plans on two grounds. First, RLEA argues that the accrued unpaid wage increases and pension benefits owing to the employees of the Susquehanna under the 1975 and 1978 national wage agreements should be *entitled* to the highest priority within the scheme of classification of the Susquehanna's creditors, and that those accrued unpaid increases should share the same priority level as all other administrative expenses, citing *In re Chicago, Rock Island and Pacific Railway Co.*, 90 F. 2d 312 (7th Cir. 1927), *cert. denied* 302 U.S. 717 (1938). RLEA requests that the employees' wage claims now in class 3 be elevated to class 2.

Second, RLEA argues that we should condition the Liquidation Plans, as well as the acquisition of the Susquehanna's line by the NYS&W, to require employee protection specified in the MRRA and 49 U.S.C. 11347. It contends that those protections require negotiation with labor organizations for the preferential hiring of employees of the abandoned line. Adverse effects on employees include loss of employment, reduction in earnings, and less desirable working conditions. RLEA argues that this proceeding is governed by section 17(b) of the MRRA, and that employee protections must be imposed at least as protective as those specified in 49 U.S.C. 11347. RLEA maintains that section 17(b) makes no distinction among situations where the purchaser is a carrier or a non-carrier (as here) or where the sale is immediately preceded by a total cessation of the operations over the lines involved. RLEA suggests that although the sale to NYS&W is being presented to the Commission under the cloak of liquidation plan, the transaction in reality is one which will trigger the obligations to impose protections consonant with section 17(b).

* * * *

The Chemical Bank, Manufacturers Hanover Trust Company, and *United States Trust Company of New York*

(called Indenture Trustees) submitted a joint pleading in opposition to RLEA's verified statement. Indenture Trustees assert that the plans are "fair and equitable" to the interests of the former employees of the debtor, and are not incompatible with the public interest as defined by section 17(e) of the Bankruptcy Act. They argue that the term "fair and equitable" is a term of art meaning that senior creditor interests are entitled to full priority over junior interests in any distribution plan. *Ecker* v. *Western P. R. Corp.*, 318 U.S. 448 (1943). They assert that these plans fully comply with the absolute priority rule in bankruptcy proceedings since the First Plan provides that distribution of proceeds from the liquidation of the debtor shall go to classes of creditors in numerical order, as their claims may be allowed. With regard to the imposition of the labor protective conditions sought by RLEA, the Indenture Trustees contend that the matter is moot inasmuch as the Commission has already determined in AB-210 (Sub-No. 1), *supra,* that this proceeding is governed by section 17(a) of the MRRA and, as such, the court can impose labor protection conditions if warranted. *Accord* AB-46 (Sub-No. 22). *Chicago, R. I. and P. R. Co. Abandonment,* 363 I.C.C. 150 (1980). The Indenture Trustees point out that the court had held a hearing on the Liquidation Plan and the desirability of imposing labor conditions. In its opinion dated November 18, 1980, the court denied all labor protection to former employees and reaffirmed the Commission's conclusion in AB-210 (Sub-No. 1), *supra,* that this proceeding is governed by section 17(a) of the MRRA and not section 17(b).

* * * *

NYS&W also filed a reply to RLEA's pleading. It adopts the arguments presented by the Indenture Trustees with regard to the undesirability of imposition of employee protective conditions and asserts that Susquehanna's employees have been fairly treated both prior to and subsequent to the debtor's cessation [*sic*] operations. NYS&W

points to the steps taken by the debtor from about mid-1979 as a result of a report made to the debtor by L. E. Peabody and Associates. The actions taken are outlined in depth in the court's opinion of November 18, 1980, *supra*. These include reducing the total work force (the task started in June 1979) to 25 as of August 29, 1980. The reduction was accomplished through attrition in the clerical area, additional mechanization within the track maintenance department, and a general decline in business. Of the 25 persons employed by the debtor on August 29, 1980, 23 were hired by NYS&W. One employee died. Consequently, only one of the people employed by the trustee on the date operations ceased was not hired by NYS&W. That person is receiving benefits from DO. Former employees of the debtor are being given priority in filing positions on the NYS&W which may be required in the future in connection with rehabilitation of the lines. Accordingly, NYS&W contends that the treatment accorded employees of the debtor was eminently fair, and employee protection is not warranted.

Discussion and conclusions.—The record before us establishes an appropriate basis for recommending to the Bankruptcy Court that the First and Second Amended Plans of Liquidation meet the requirements of subsection (b) of section 77 of the Bankruptcy Act, and that they are compatible with the public interest. The Plans contain provisions for the continued preservation of the Debtor's rail services by a successor entity. *Penn Central Transportation Company Reorganization*, 347 I.C.C. 45, 82 (1973). As required by subsection (b)(1), the Plans contain provisions for modifying or altering the rights of creditors. They also contain provisions for adequate means of execution of the Plans. Inasmuch as the Susquehanna is being liquidated, there will be no fixed charges from probable prospective earnings.

We note also that the Plans comply with the requirements of the Bankruptcy Act for a fair and equitable settlement of all claimants and creditors. The Plans afford due

recognition to the rights of each class of creditors or stockholders inasmuch as all senior claims will be paid in full prior to the unsecured claims. We disagree with RLEA's request that unpaid wage claims be placed in class 2. Such wage claims are properly categorized as operating administrative expenses. Further, no valid reason was presented by RLEA to afford a higher category for these wage claims.

* * * *

We disagree with RLEA's assertion that the liquidation Plans, as well as the authority to be granted in the acquisition and operation application filed by NYS&W should include employee protective provisions. RLEA's argument, in brief, is based on its analysis that section 17(b) of the MRRA applies to the proceedings here because this as a situation where the transaction involves the "sale or transfer of a line of railroad to the use in continued rail operations * * *." RLEA argues that section 17(b) makes no distinction whether the sale is preceded by a cessation of rail operations, but that the significant triggering fact is that the sale or transfer concerns *continued* [emphasis supplied], uninterrupted rail operations. If such is the case, then the court must impose labor protective conditions similar to those required under 49 U.S.C. 11347.

We have previously stated in AB-210 (Sub-No. 1), *supra* that:

> As this proceeding is governed by the MRRA the court has the authority, under section 17(a)(1) of the act, to impose employee protection conditions when it decides whether to authorize the abandonment.

In approving the abandonment, the court in its discretion has decided that no employee protective conditions would be authorized. Pursuant to section 17(b) it is the court's duty to impose labor protective conditions required by 49 U.S.C. 11347. The Commission has previously determined that the protective conditions promulgated in *New York*

Dock Ry.—Control—Brooklyn E.D.T., 360 I.C.C. 60 (1979), affirmed *sub nom, New York Dock Ry.* v. *United States,* 609 F.2d 183 [*sic*] (2d Cir. 1979), constitutes the minimum level of protection required by 49 U.S.C. 11347. Asuming [*sic*] *arguendo* that the instant proceeding is governed by section 17(b), the Commission is still not *required* to impose any labor protective conditions since that responsibility rests with the court.

Further, with respect to the acquisition and operation application filed pursuant to 49 U.S.C. 10901, no obligation was placed on the Commission to impose labor protective conditions on a section 10901 application. Section 221 of the Staggers Rail Act of 1980, Public Law 96-448, October 14, 1980, amended 49 U.S.C. 10901 (49 U.S.C. 10901(e)) to give the Commission *discretion* to impose labor protection conditions. However, the record before us fails to show how employees of the Susquehanna will be harmed by DO's acquisition.

We have another, more compelling reason for not imposing labor protective conditions in the section 10901 application proceeding. As we stated in Finance Docket No. 29237, *State of Wisconsin—Acquisition of Certain Lines of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* served August 12, 1980, we must act to promote continued rail service while providing protection for adversely affected employees, if any. In F.D. No. 29237, as well as in the instant proceeding, a new carrier/operator would acquire and operate the bankrupt carrier's lines. Imposition of employee protective conditions on new operators would be counterproductive. These operators are frequently new business enterprises, as is NYS&W, attempting to make a going business concern over lines that have been operationally uneconomical. To maintain a favorable revenue-to-cost ratio, the expenses of these new carriers must be kept to a minimum. If we were to impose employee protective conditions here, the result could be

even more railroad employees out of work. Accordingly, we decline to impose employee protective conditions.

We believe it to be especially appropriate to our approval of the Liquidation Plans that provision is made therein for a successor entity to acquire the physical assets and to continue rail oeprations [*sic*] of the debtor. Based on the filing made in F. D. No. 29422, discussed below, NYS&W, as the successor carrier, has demonstrated the financial ability to acquire the assets and to commence operations of the debtor's railroad. In view of all these factors, we conclude that the Plan [*sic*] of Liquidation meet all the réquirements of section 77(b) of the Bankruptcy Act and should be approved by the court.

Related Applications—Acquisition and Securities Issue

On July 14, 1980, NYS&W filed an application for a certificate of public convenience and necessity permitting the acquisition and operation of all of the abandoned lines of the Susquehanna. The proposed acquisition and operation are governed by 49 U.S.C. 10901, and the Commission's regulations appearing in 49 CFR Part 1120. Statements in opposition to this application were filed by RLEA, the Brotherhood of Locomotive Engineers, which adopted RLEA's comments, and the Pennsylvania State Legislative Board, United Transportation Union (UTU).

NYS&W also filed an application under 49 U.S.C. 11301 for authority to issue 500 shares of common stock at a value of $2,000 per share for a total of $1 million to be secured by a first mortgage bond in the amount of $4,500,000, to be issued on the New Jersey Economic Development Authority or sold to a bank with a guarantee by the Federal Economic Development Agency. NYS&W also seeks to issue this bond without competitive bidding.

NYS&W, a subsidiary of DO, was incorporated on March 17, 1980, under the laws of the State of New Jersey, for the

express purpose of acquiring and operating the abandoned lines of the Susquehanna.

The total mileage of main line proposed to be acquired and operated is 59.9 miles, extending from Croxton to Sparta Junction. As noted before, the Susquehanna has three branches extending from its main line: The Edgewater Branch has 6.0 miles of track; the Passaic Branch has 3.1 miles of track; and the Lodi Branch has 2.4 miles of track. The Suscon Branch of Susquehanna Connecting Railway Company (operated by ConRail) extends 5.0 miles.

The area in which the tracks are located is heavily industrial. Many of the industries have no alternate means of shipping or receiving freight except by rail. Although the areas are heavily industrialized, applicant states that there is tremendous potential for additional rail traffic, and states that DO's offer to acquire the abandoned lines was accepted by the court over three competing offers.

The sale agreement between the trustee and NYS&W covers all real property and tangible and intangible personal property of the Susquehanna. The purchase price is $5 million to be paid, as follows: (1) the sum of $100,000 was deposited with the trustee on June 4, 1980; (2) an additional $100,000 shall be paid by DO to the trustee within 10 days following the issuance of an order by the court approving the sale agreement; (3) at closing NYS&W shall pay to the trustee the balance of $4,800,000 in cash or certified check, subject to a reduction on account of any credits referred to in certain clauses of the sale agreement.

* * * *

Protests.—In its protest to NYS&W's application, UTU states that satisfactory service to the patrons on the Suscon Branch will not be provided after the proposed transfer of ownership because "the proposed owner does not have the resources and knowledge" possessed by the present owner-operator. No supportive evidence is submitted for the general allegation.

RLEA repeats its previous argument requesting that employee protective conditions be imposed on any authority granted here. We have previously disposed of this issue and have concluded that no employee protective conditions are warranted.

There were no protests filed to the securities application.

Discussion and conclusions.—We believe the public convenience and necessity requires the granting of the application of NYS&W to acquire and operate the Susquehanna's lines. No meaningful opposition has been raised to either the acquisition application and none to the securities issuance request. As we observed before, it appears that the NYS&W will have the financial resources to consummate the acquisition and have sufficient funds to start up operations over the abandoned lines. Moreover, granting the application will serve a useful public service in that shippers will continue to have rail service available to them and that there will be no interruption of such service when the debtor liquidates its assets.

In the circumstances, we believe the acquisition application and the securities issuance application should be granted.

We find:

1. In Finance Docket No. 28098 (Sub-No. 1), the First and Second Amended Plans of Liquidation meets [*sic*] the requirements of subsection (b) of section 77 of the Bankruptcy Act, is [*sic*] fair and equitable, affords [*sic*] due recognition to the rights of each class of creditors and stockholders, does [*sic*] not discriminate unfairly in favor of any class of creditors or stockholders, will conform to the requirements of the law regarding participation of the various classes of creditors and stockholders, and will otherwise meet the requirements of subsection [*sic*] (b) and (e) of section 77 of the Bankruptcy Act, and will be compatible with the public interest.

2. In Finance Docket No. 29421, the proposed acquisition and operation of the lines of railroad previously owned and operated by the Susquehanna by the NYS&W (a) is necessary to insure the continued rail service to shippers along the lines; and (b) contains terms that are just and reasonable.

3. In Finance Docket No. 29422, the proposed issuance of 500 shares of common stock at a value of $2,000 per share for a total of $1 million by NYS&W (a) is for a lawful object within its corporate purpose and appropriate for that purpose; (b) is compatible with the public interest; (c) is appropriate for or consistent with the proper performance by application of service to the public as a common carrier; and (d) will not impair the financial ability of the carrier to provide the service.

4. This decision will not significantly affect either energy consumption or the quality of the human environment.

It is certified:

In Finance Docket No. 29421, the present and future public convenience and necessity require the proposed acquisition and operation by the NYS&W of the lines of railroad described above.

It is ordered:

1. In Finance Docket No. 28098 (Sub-No. 1), the First and Second Amended Plans of Liquidation should be approved.

2. In Finance Docket No. 29421:

(a) Applicant shall file with this Commission schedules establishing rates and charges applicable to the line with appropriate reference to this proceeding.

(b) If the authority granted is exercised, applicant shall, within 60 days after consummation, submit for considera-

tion by the Commission, two copies of all journal entries required to record the transaction and, within 15 days after commencement of operations, shall give the Commission written notice of the dates when the acquisition was consummated and operations over the lines were commenced.

(c) Unless this authority is exercised within 1 year from the effective date, this certificate and decision shall be of no further effect.

3. In Finance Docket No. 29422:

(a) NYS&W is authorized to issue not exceeding 500 shares of common stock having a value of $2,000 per share for a total of $1 million upon the terms and for the purposes stated.

(b) Except as authorized by this decision, the stock shall not be sold, pledged, repledged or otherwise disposed of by the applicant until approved by this Commission.

(c) Applicant shall report to the Commission as required by 49 CFR 1115.6.

(d) The Commission reserves the right under 49 U.S.C. 11301 to issue any supplemental decisions in this matter as it deems necessary.

(e) Nothing in this certificate and decision shall be construed to imply any guaranty or obligation as to the stock or dividends on the part of the United States.

4. This decision shall become effective on the date of service.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Commissioner Clapp was absent and did not participate in the disposition of this proceeding.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX E

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 79-2531 and 70-2532

IN THE MATTER OF:

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Debtor

Railway Laborers' [*Sic*] Executives Association,
Appellant in 79-2531

New Jersey Department of Transportation,
Appellant in 79-2532

Appeal From the United States District Court for the District of New Jersey

(D.C. Bankruptcy No. 76-0182)

Argued September 17, 1980
Before: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges.

Filed September 30, 1980

. . . .

OPINION OF THE COURT

PER CURIAM.

The New York, Susquehanna & Western Railroad Company filed a petition for reorganization under § 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976), in the United States District Court for the District of New Jersey in January 1976. A number of extensions of time to file a reorganization plan were granted until the court on July 12, 1979 ordered the trustee to submit a plan for orderly liquidation.

The district court considered the rights of creditors and the public interest in the railroad's survival. After reviewing reports and briefs submitted by the parties, as well as hearing oral argument, the court found that there was little or no hope of reorganization. It determined that continued operation of the railroad would erode the collateral of the creditors and serve no significant purpose toward reorganization. Concluding that an unconstitutional taking had "resulted and [would] continue to result," the court directed that abandonment proceed without prior Interstate Commerce Commission approval.

After a number of affected parties requested reconsideration, the court held another hearing at which testimony was taken and the parties argued their positions. On August 23, 1979, the court again found the unconstitutional taking should not continue, and, although not a prerequisite for abandonment, ordered that both the ICC and the New Jersey Department of Transportation be requested to submit recommendations. Several appeals were taken from the court's orders.

While the appeals were pending in this court, the district court reviewed offers to purchase the railroad and eventually determined that a proposal submitted by the Delaware Otsego Corporation was the most suitable. In August 1980 both the ICC and the New Jersey Department of Transportation recommended abandonment, and the district court directed that the prospective purchaser take over service on the debtor's line as of September 2, 1980.

The Railway Labor Executives' Association (RLEA) argues that in July 1979 the district court had no authority to order abandonment or liquidation without prior approval by the ICC. An additional contention is that there was insufficient evidence of unconstitutional erosion. New Jersey asserted similar grounds, but at oral argument took the position that it is content with the Delaware Otsego

offer and wishes to assert its objections only if that transaction is not completed.

On November 4, 1979, the Milwaukee Railroad Restructuring Act, 45 U.S.C.A. §§ 901-922 (West Cum. Supp. 1980), took effect, providing in § 17, id. § 915, that a reorganization court may authorize abandonment of railroad lines pursuant to § 1170 of the new Bankruptcy Act, 11 U.S.C. § 1170 (Supp. III 1979). Section 1170 eliminates the necessity for prior approval by the ICC, 5 COLLIER ON BANKRUPTCY ¶¶ 1170.01-.04 (15th ed. 1980), although § 17(b)(1) of the Milwaukee Act gives that agency the opportunity to approve or disapprove "the sale or transfer of a line of railroad to be used in continued rail operations." 45 U.S.C.A. § 915(b)(1). The Milwaukee Act explicitly states that it applies to § 77 reorganization cases pending on November 4, 1979, *id.* § 915(a) & (b), and accordingly governs this litigation.

It is clear that even if we were to conclude that the district court lacked authority to order an abandonment in July 1979—a question we need not now decide, *cf. Central Railroad v. New Jersey*, 485 F.2d 208 (3d Cir. 1973) (in banc), *cert. denied*, 414 U.S. 1131 (1974)—the enactment of the Milwaukee Act granted it such power. Consequently, even if we were to accept the appellant's contention that the orders of July and August 1979 were invalid, the district court would be able to enter similar orders on remand. Thus, in a practical sense, any validity to the appellant's argument has been nullified by the passage of the Milwaukee Act.

The Railway Labor Executives' Association would have us set aside the July and August 1979 orders and require the district court to begin anew under the Milwaukee Act. The RLEA argues that only in that fashion can the labor protection required by the Act be made effective. *See* 45 U.S.C.A. § 915(a) & (b). It is obvious, however, that we cannot turn back the clock, and any attempt to do so would

likely harm the employees' interests as well as jeopardize the transaction with Delaware Otsego. In any event, we were advised at oral argument that the district court has scheduled hearings at which time the matter of employee protection will be considered. We are not persuaded at this stage that the district court cannot arrive at a satisfactory solution to that problem.

The appellants also assert that the district court did not adequately explain its basis for concluding that unconstitutional erosion had taken place. The district court did not elaborate on its findings, but it is obvious that it carefully examined the detailed financial data submitted by the parties, both before its July 27 order and on reconsideration in August 1979.[1]

The court capsulized the important findings. Revenues in 1978 were down and expenses were up, thus increasing the deficit. The speculative 3 to 5 million dollar liquidation figure was weighed against 4.2 million dollars in bonds plus the unliquidated administration expenses, none of which had been paid. The court described the situation as "bleak" and found nothing at the reconsideration proceedings to change its view. The district judge was quite conscious of the public interest in continued service and the impact his order would have upon employees, shippers, and industry in the area. But he noted that despite many extensions no one had come forward with any proposal for the substantial infusion of capital, operating subsidies, or other feasible plans for the continuation of operations on a sound financial basis. We are not persuaded that there is inadequate evidence to support the district judge's appraisal of the situation.

---

[1] The appellant has moved to strike the Gross report from the record in this case. The motion is denied herewith.

The district court's orders of July 27, 1979 and August 24, 1979 will be affirmed.

To THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

APPENDIX F

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1977

IN THE MATTER OF:

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Debtor,

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant.

Appeal From the United States District Court for the District of New Jersey

(D.C. Bankruptcy No. 76-0182)

Argued September 17, 1980
Before: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges.
Filed September 30, 1980

. . . .

OPINION OF THE COURT

PER CURIAM.

This appeal was taken by the Railway Labor Executives' Association from Orders Nos. 101 and 103 of the United States District Court for the District of New Jersey, which approved the offer of the Delaware Otsego Corporation to purchase assets of the debtor and authorized the trustee to enter into an interim lease agreement with the prospective purchaser. The orders also provide for the revision of abandonment petitions previously filed with the Interstate Commerce Commission, as well as the New Jersey Department of Transportation, and require reports from those agencies. In August 1980, both the ICC and the New Jersey Department of Transportation approved abandonment of

service by the debtor, and, on September 2, 1980, a subsidiary of the Delaware Otsego Corporation began service on at least some of the debtor's lines.

The Railway Labor Executives' Association (RLEA) contends that no adequate provisions have been made for employee protection as required by the Milwaukee Act, 45 U.S.C.A. §§ 901-922 (West Cum. Supp. 1980). However, as we noted in our opinion at 79-2531 and 79-2532, hearings on the plan for liquidation are scheduled to be held in the district court and at that time the RLEA may raise the issue of employee protection. The district court has not ruled on the matter as yet, and therefore we cannot pass on any alleged error in that respect. The RLEA asserts that the district court has refused to consider employee protection, but nevertheless we cannot predict how the court will rule at the forthcoming hearings.

Accordingly, this appeal is premature and will be dismissed without prejudice to the Railway Labor Executives' Association to file a new appeal, if it desires, after the district court has entered a definitive order.

To THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

APPENDIX G

STATUTE INVOLVED

Section 17, Milwaukee Railroad Restructuring Act, 45 U.S.C. § 915

Sec. 17(a). Notwithstanding any other provision of law, in any case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act, the court may authorize the abandonment of lines of railroad pursuant to section 1170 of title 11 of the United States Code. Pending the expiration of the time for appeal of an abandonment order or the determination of any such appeal, the court may authorize the termination of service on a line to be abandoned, and the order authorizing such termination may not be stayed. In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(b) (1) Notwithstanding any other provision of law, in any case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act, the court may authorize the sale or transfer of a line of railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection, if the application with respect to such sale or transfer is filed with the Commission on or after November 1, 1979. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49, United States Code.

(2) The court described in paragraph (1) may not authorize a sale or transfer pursuant to such paragraph unless an appropriate application with respect to such sale or transfer is initiated with the Commission and, within such time as the court may fix, not exceeding 180 days, the Commission, with or without a hearing, as the Commission

may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Commission approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706 (2) (A), 706 (2) (B), 706 (2) (C), and 706 (2) (D) of title 5 of the United States Code.

(3) Pending review of an application by the Commission pursuant to paragraph (2) of this subsection, the court described in paragraph (1) may, on a preliminary basis, authorize the sale or transfer proposed in such application. The court may permit the purchasing carrier to operate interim service over the lines to be purchased, and in operating such service it shall use employees of the carrier subject to the bankruptcy proceeding to the extent such purchasing carrier deems necessary for the operation of such service.

(c) Any action or order of the Commission approving, modifying, conditioning, or disapproving an application for the sale or transfer of rail property that is filed with the Commission before November 1, 1979, in connection with a case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act——

(1) is subject to review by the court only under sections 706 (2) (A), 706 (2) (B), 706 (2) (C), and 706 (2) (D) of title 5 of the United States Code; and

(2) may not be stayed by the Commission.

(d) The authority of the bankruptcy court to authorize abandonments, sales, and transfers of lines of the Milwaukee Railroad shall be governed by the provisions of section 5 of this Act, rather than the provisions of this section.

(e) Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this Act.

APPENDIX H

List of RLEA Member Organizations

American Railway & Airway Supervisors Association, Division of BRAC
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Railway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

Opposition

1

NO. 81-1715

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquequehanna & Western Railroad Company, NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS INDENTURE TRUSTEES' BRIEF IN OPPOSITION

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Dated: April 15, 1982

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Counter-Statement of Question Presented

1. Whether the lower courts correctly interpreted Section 17(a) of the Milwaukee Railroad Restructuring Act, ("MRRA") 45 U.S.C. §915(a), in their holdings that imposition of labor protection benefits was an unwarranted condition to the Trustee's total abandonment of the Debtor's rail line.

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NO. 81-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company, NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS INDENTURE TRUSTEES' BRIEF IN OPPOSITION

Counter-Statement of the Case

On January 20, 1976, in desperate financial condition and with all of its assets encumbered by the liens of various bond issues[1], which had recently been declared in default and accelerated, the New York Susquehanna and Western Railroad Company (hereinafter "Debtor" or "NYS&W") filed for relief under Section 77 of the Bankruptcy Act, 11 U.S.C. §205 (repealed). On July 16, 1979, after three and one half years of continuous losses, the District Court concluded that reorganization of the Debtor was impossible, that creditors' property was being taken, and that abandonment of the rail line and termination of service by the Trustee was constitutionally mandated. (Order No. 81). The District Court reiterated this ruling after a prehearing in August 1979, and ordered the Trustee to undertake the orderly liquidation of the Debtor. (Order No. 83). Orders Nos. 81 and 83, appealed by the Railway Labor Executives' Association (hereinafter "RLEA") and others, were affirmed by the United States Court of Appeals for the Third Circuit on September 30, 1980.[2] (Ct. App. Nos. 79-2531/2/3/4).

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[1] Chemical Bank serves as Indenture Trustee of the Debtor's General Mortgage Income Bonds, United States Trust Co. is Indenture Trustee of the Terminal First Mortgage Bonds, and Manufacturers Hanover Trust Co. acts as Trustee under the Inture of the Series A First and Consolidated Bonds. Orders No. 95, 96 and 97 entered by the District Court found the liens of the bonds to be valid encumbrances on all of the Debtor's assets.

[2] RLEA's assertion (Petition at 26) that a railroad reorganization court does not have authority to liquidate a Debtor runs squarely contra to the Third Circuit's affirmance of Orders 81 and 83, which are binding as law of the case. In those earlier Appeals, all Appellants raised as grounds for reversal the alleged lack of power in the District Court to order the liquidation of the Debtor.

In an effort to discharge his duty to liquidate the assets of the Debtor, the Trustee proceeded with appropriate applications before the Interstate Commerce Commission (hereinafter "Commission" or "ICC") and the New Jersey Department of Transportation ("NJDOT") for authority to abandon the Debtor's entire line and to discontinue all service. The Trustee's Petition for abandonment to the ICC was filed pursuant to that agency's newly promulgated regulations governing abandonments pursuant to Section 17(a) of the MRRA, now codified at 49 CFR 1121.60.

The ICC issued its decision on August 12, 1980 authorizing abandonment by the Trustee under Section 17(a) of the MRRA. *New York, S & W R.R. Co., etc.—Abandonment* (No. AB-210, Sub. No. 1).[3] On August 27, 1980, the NJDOT adopted the decision of the Administrative Law Judge who conducted parallel state administrative hearings, and recommended the issuance of a certificate of public convenience and necessity allowing abandonment by the Trustee. The Trustee served notice of his intent to abandon the Debtor's line effective August 29, 1980, and abandoned service on that date in compliance with the District Court's Orders. Thus, more than one year after

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[3] RLEA's implication (Petition, at 7) to the effect that because the District Court never entered an Order expressly adopting the ICC's August 12, 1980 decision it thereby acted improperly is totally without support either in law or fact. Nothing in 11 U.S.C. §1170, or Section 17(a) of MRRA, requires an express adoption of the ICC's report by the District Court for an abandonment to be effective. Of course, RLEA was given ample opportunity to be heard on all aspects of this proceeding, and its assertion that no hearing was held not only misconstrues 11 U.S.C. §102(1), but is contrary to the facts. The record is replete with references to, and approval by, the District Court of the ICC decision recommending abandonment (e.g., App. 7a, 11a).

the District Court first recognized the constitutional impediment to continued operation, the erosion of the collateral of secured creditors finally ceased.

On September 23, 1980, the District Court held an evidentiary hearing on whether labor protection should be imposed as a condition to the Trustee's abandonment. RLEA was afforded a full opporunity to present its proofs on this issue. However, it failed to present any concrete evidence to show what, if any, employees are allegedly entitled to labor protection, and in what amount, and it failed to rebut the efficacy of releases from employees in return for negotiated lump sum payments. Nevertheless, petitioner continues its abstract speculation on that issue (e.g., Petition, at 9; at 21, n. 13).

It is important to note, moreover, that during the entire period of the Trustee's rail operation, railway labor continued to be paid. Furthermore, accrued but unpaid wage increases to employees under collective bargaining agreements are classified prior to the claims of secured creditors under the Plan of Liquidation (App. B-2, at 25a).

In addition, the new carrier which commenced operations over the railroad lines formerly operated by the Trustee has hired all but one of the persons employed by the Trustee on the date he ceased operations (August 29, 1980), at prevailing wages with all fringe benefits. The one person not hired by the new carrier is receiving payments under a separate arrangement.

It is also significant that RLEA appears to concede, consistent with the findings below, that the Trustee's reductions of the work force over time were proper, and were motivated by legitimate business reasons rather than by any anti-employee animus. (Petition, at 8, fn. 7).

RLEA's application to the District Court seeking the imposition of labor protective conditions was denied in Order No. 109 (App. B-1, at 3a), the reasons for the denial having been set forth in an Opinion dated November 18, 1980. (App. B-2 at 5a).

On December 27, 1980, the Trustee's Second Amended Plan of Liquidation was certified by the ICC as being in compliance with Section 77 of the Bankrupcty Act (App. D, at 39a). In that decision, the Commission reiterated its earlier determination that the proceedings before it constituted an abandonment under Section 17(a) of the MRRA. (App. D, at 47a). The ICC further noted that "the record before us fails to show how employees of the Susquehanna will be harmed by DO's acquisition." (App. D, at 48a).

On March 24, 1981, the District Court conducted a hearing as required under Section 77(e) of the statute, 11 U.S.C. §205(e), and thereafter issued an Opinion and Order approving the Plan (App. C-1, at 29a). The Plan cannot be consummated, however, until the conclusion of all judicial and regulatory proceedings concerning the liability of the new carrier for labor protection.

RLEA filed appeals from both Order No. 109, denying labor protection, and the Order approving the Plan. Both appeals were consolidated before the Third Circuit Court of Appeals. On November 16, 1981, the Court of Appeals affirmed both Orders of the District Court. (App. A, at 1a). RLEA now seeks a writ of certiorari to the Court of Appeals to consider whether former employees of the Trustee are entitled to any labor protection benefits as a result of the Trustee's abandonment of the rail line. This petition represents RLEA's final attempt to block the consummation and conclusion of this reorganization proceeding. The United States District Court, the United States

Court of Appeals for the Third Circuit, the United States Court of Appeals for the Seventh Circuit, the Interstate Commerce Commission and the New Jersey Department of Transportation, with the concurrence of the Trustee and all other parties to this proceeding, have uniformly held, after extensive hearings, that the result below was proper, fair, constitutional and consistent with prior authorities. Only RLEA sounds a dissenting voice. In such circumstances, the grant of the petition would be inappropriate.

For the reasons which follow, the Indenture Trustees respectfully submit the Petition should be denied.

REASONS FOR DENYING THE WRIT

1. All decisions of the several Circuit Courts of Appeals are in accord on the question presented to this Court. There has been no showing that the Circuit Courts of Appeals are unable to dispose of the other abstract questions presented by petitioner, if and when those questions actually materialize.

In its Opinion below, the District Court relied in part upon an unreported decision of the Chicago Rock Island and Pacific R.R. Co. ("Rock Island") reorganization court. (N.D.Ill., No. 75-B-2697, Order No. 248). Before consideration of the District Court's decision by the Court of Appeals below, the United States Court of Appeals for the Seventh Circuit reviewed and affirmed that decision of the Rock Island reorganization court. *In re Chicago, Rock Island & Pacific R.R. Co.*, Appeals of RLEA, (Nos. 80-1788, 2199, 2286, 7th Cir. 1981) (hereinafter *"Rock Island Abandonment"*). The Seventh Circuit specifically held that labor protection benefits were not a mandatory condition in

a total systemwide abandonment (such as occurred in Rock Island) under Section 17(a) of MRRA. The Seventh Circuit reasoned that requiring labor protection in a total abandonment "is contrary to what seems so clearly to be the intent of Congress in enacting Section 17(a)." *Rock Island Abandonment,* at 8. The MRRA "was not intended to work a change in existing law as it affects employee protection . . . and the existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments." *Id.*

The Third Circuit Court of Appeals affirmed the District Court's Order and opinion for the reasons set forth therein, and also on the basis of *Rock Island Abandonment.* Thus, the only two Circuit Courts of Appeal which have considered the question which RLEA seeks to have certified are in accord in declaring that in a total abandonment of a Debtor's rail line under Section 17(a) of the Milwaukee Act, which is unquestionably the case presented here,[4] labor protection benefits are not required. There is thus no conflict among the circuit courts which calls for this Court's exercise of its supervisory authority in reconciling inter-circuit disagreements. Nor is there any showing that the several Circuit Courts of Appeal will be unable to address other abstract issues raised by RLEA[5] in future cases, when and if they arise. Therefore, the Petition for a writ of certiorari should be denied.

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[4] RLEA attempts to raise as an issue here (Petition at i; 24), what was essentially the resolution of a question of fact by the District Court, to wit, whether the Trustee's actions constituted an "abandonment" governed by §17(a) of the MRRA, or a "sale or transfer" governed by §17(b). As will be discussed more fully in Point 4, *infra,* it is inappropriate to attempt to review questions of fact by writ of certiorari.

[5] As more fully discussed in Point 3, *infra,* RLEA's attempt to interject constitutional issues is improper, since those issues are not ripe for decision.

2. RLEA's strained effort to find a conflict between the decisions below and the applicable decisions of this Court is totally without substance.

RLEA has presented decisions of this Court which generally discuss basic principles of statutory construction, (*e.g., United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166 (1980), *Rubin* v. *United States,* 449 U.S. 424 (1981), *TVA* v. *Hill,* 437 U.S. 153 (1978)) (Petition, at 16-17) and has attempted to manufacture a conflict between the cited cases and the decisions of the lower courts. It is abundantly clear, however, that RLEA has failed to present any decision of this Court which is in conflict with the decisions of the courts below on the specific issue presented, to wit, whether labor protection should be imposed. Nor is there any conflict between decisions of this Court and the decisions of the lower courts on the proper application of settled principles of statutory construction.

RLEA asserts (Petition, at 17-19) that the courts below, and the Interstate Commerce Commission in its past decisions, were in error in employing legislative history as aids to construction of both Section 17(a) of the MRRA, and Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, ("4R Act") codified at 49 U.S.C. §10903(b)(2), on the grounds that both statutes are facially clear. RLEA then leaps to the conclusion that the courts below are in conflict with those decisions of this Court which generally hold that a clear law should be read as it is written.

At the outset, it is apparent that the artificially narrow principle of statutory construction advocated by RLEA is without merit. There is no rule of law which forbids use of legislative history as an aid to construction of a statute, however clear the words may appear on superficial examination. *Cass* v. *United States,* 417 U.S. 72, 78 (1974);

United States v. *American Trucking Associations,* 310 U.S. 534, 543-544 (1940). A court's task is to interpret the words of a statute in light of the congressional purpose, and in ascertaining that purpose, the legislative history is always relevant. *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 9-10 (1976).

Moreover, the premise upon which RLEA builds its argument is faulty, since both the MRRA and 4R Act by their terms require reference to other legislation to ascertain their meanings, and, therefore, cannot be said to possess such irrefutable facial clarity as might suggest that one need not resort to the use of legislative history as an aid to construction. The lower courts (and the Seventh Circuit Court of Appeals in the *Rock Island Abandonment*) were totally justified in considering all available evidence of Congressional intent in interpreting the language of Section 17(a) of the MRRA. The harmonious conclusions reached by those courts, i.e., that in total system abandonments pursuant to §17(a) labor protection is not warranted, are unquestionably correct, and are consistent with all apposite decisions of this Court.

3. The decisions below do not raise a substantial constitutional question.

The decision below and in *Rock Island Abandonment* do not rest on constitutional grounds. Rather, those decisions are products of the construction of a federal statute (Section 17(a) of the MRRA) by lower federal courts. Although constitutional principles are otherwise involved in the reorganization proceedings in both the *Rock Island* and the *NYS&W,* the decisions of the courts in those two proceedings denying the imposition of labor protection benefits on the total abandonment of both rail lines may stand

without reference to any constitutional provisions, and in fact rest on a consistent reading of Section 17(a) of the MRRA. As RLEA concedes, the United States Constitution is not implicated until this Court concludes that the lower courts' interpretation of that statute was in error. The constitutional issues which RLEA tries to interject here are therefore insubstantial and not ripe for decision.

The only aspect of the within Section 77 proceeding which directly raised constitutional issues was determined on September 30, 1980, when the United States Court of Appeals for the Third Circuit affirmed District Court Orders Number 81 and 83. Those two Orders, and the accompanying Opinions, were motivated by the guarantees of equitable treatment of creditors embodied in the Fifth Amendment due process and just compensation clauses. In concluding that the Debtor's line must be abandoned, and the Debtor liquidated, the District Court found the point of constitutional "taking" had been reached.

However, in determining that labor protection was not warranted in their respective proceedings, both the Courts below and the *Rock Island Abandonment* Court relied upon general, non-constitutional transportation law, as elucidated in a line of decisions stretching back forty years to *Interstate Commerce Commission* v. *Railway Labor Executive Association*, 315 U.S. 373 (1942).[6] (See, e.g., App. at 19a-25a).

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[6] Thus, even if this Court were to reach the issue of whether MRRA is a non-uniform bankruptcy law, see *RLEA* v. *Gibbons*, —— U.S. ——, 50 U.S.L.W. 4258 (1982), and so conclude, it would not change the result in this case. Whether the arbiter of the labor protection issue is the District Court under Section 17(a), or the ICC, under 49 U.S.C. §10903(b)(2), as under pre-MRRA law, all of the applicable precedents hold that labor protection should not be imposed.

The Courts of Appeals decisions in both the *Rock Island* and *NYS&W* cases thus do not raise any constitutional question for this Court to address. RLEA recognizes this fact (Petition, at 21), when it argues that a constitutional question would *only* arise *if* this Court were to conclude that the lower courts improperly construed Section 17(a) of the MRRA. Thus, RLEA concedes that this case presents no more than a question of the correctness of the construction of a federal statute, a matter on which the lower federal courts have spoken with one voice. Because the lower courts have consistently and correctly construed Section 17(a) of the MRRA, it is not necessary for this Court to either reach or decide the abstract question of constitutional law which RLEA attempts to interject into this proceeding. Therefore, the petition should be denied.

4. In asking this Court to review the lower court's holdings that the Trustee's disposition of the debtor's assets constituted an abandonment, RLEA seeks review of a question of fact.

In deciding that the Trustee's actions constituted an abandonment, subject to Section 17(a) of the MRRA, rather than a sale or transfer, under Section 17(b), the District Court carefully analyzed the factual circumstances of this case. The lower court reviewed the Trustee's actions in virtually conceding that the Debtor could not be made profitable, could not be reorganized and must cease current operations and liquidate. The court was no doubt influenced in part by RLEA's argument, in a brief filed with the District Court on April 24, 1980, that the Trustee's actions, "if approved, will certainly result in the "abandonment of" the NYS&W line." (RLEA April

24, 1980 Memorandum, at 10). Now, RLEA suggests that the District Court's adherence to the position espoused by RLEA itself below, is error. RLEA clearly is estopped from taking that inconsistent position on appeal. *Scarano* v. *Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953); *Glick* v. *White Motor Co.*, 458 F.2d 1287, 1293 (3d Cir. 1972); *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975) *cert. denied sub nom. Clark* v. *Johnson*, 423 U.S. 893 (1975).

Even if RLEA is not estopped, it is still disputing what was essentially a factual determination by the District Court. RLEA has no further right to have an appellate court review the issue of whether the Trustee abandoned the Debtor's line; it may not raise that issue in a writ of certiorari.

"Abandonment" is a term of art in railroad law. To "abandon" a line of railroad requires that there be a cessation of service, or long disuse, coupled with an intention of the carrier not to resume such service or use. *City of Alexandria, La.* v. *Chicago, R.I.&Pac.R.R. Co.*, 311 F. 2d 7, 10 (5th Cir. 1962). The intention of the carrier to cease all transportation service over the relevant line is the key factor in determining whether an abandonment has occurred. *Interstate Commerce Commission* v. *Chicago & N.W.T. Co.*, 533 F. 2d 1025, 1028 (8th Cir. 1976); *Interstate Commerce Commission* v. *Chicago, R.I.& Pac.R.R. Co.*, 501 F. 2d 908, 911 (8th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). All of the Trustee's actions evince the intention to permanently cease rail service, as the District Court found. Moreover, it is a fact that the Trustee has actually ceased that service. The only possible conclusion which the District Court could have drawn on the facts presented was that the Trustee's disposition of assets constituted an abandonment. RLEA in

effect asks this Court to conduct a *de novo* review of the evidence and a reassessment of the facts. This Court, however, "does not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Therefore, the question of whether this is a Section 17(a) abandonment may not be certified to the Court of Appeals, and the writ must be denied.

CONCLUSION

For all the foregoing reasons, the petition of RLEA for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Dated: April 15, 1982

Opposition

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NO. 81-1715

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna and Western Railroad Company; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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Counterstatement of Questions Presented

1. Whether §17(a) of the Milwaukee Railroad Restructuring Act requires the imposition of protective conditions for employees in the context of a total system-wide abandonment of a railroad?

2. Did the District Court abuse its discretion by refusing to impose labor protections on the facts and circumstances of this particular reorganization?

3. Does the abandonment of a rail line and the subsequent acquisition of the abandoned line by an entity that has never before operated as a rail carrier constitute an "abandonment" within the meaning of §17(a) of the Milwaukee Railroad Restructuring Act or a "sale or transfer" within the meaning of §17(b) of the Act?

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NO. 81-1715

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WALTER G. SCOTT, Trustee of the New York, Susquehanna and Western Railroad Company; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counterstatement of Facts

This matter is before the Court on the petition of the Railway Labor Executives' Association (RLEA) for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment entered by that Court on November 16, 1981 affirming two orders entered by the United States District Court for the District

of New Jersey in reorganization proceedings involving the New York, Susquehanna and Western Railroad Company (App. A of Petition). In an opinion filed on November 18, 1980, the District Court concluded that the Trustee's disposition of the railroad's assets was an abandonment governed by Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §915(a), (MRRA), that the MRRA gave a reorganization court discretion to impose or decline to impose labor protections in total system abandonments, and that the facts and circumstances of the case did not warrant the imposition of labor protections upon any party to the reorganization proceedings (App. B-2).* Order No. 109, which reiterated those findings, was entered on November 25, 1980 (App. B-1). On April 14, 1981, the District Court entered Order No. 113 approving a plan of liquidation for the debtor railroad. As indicated in an accompanying opinion filed on April 9, 1981, the District Court, adhering to the conclusions previously reached in Order No. 109, rejected the demand of the RLEA that the plan include provisions for labor protections (App. C-2).

On January 20, 1976, the New York, Susquehanna and Western Railroad Company (NYS&W) petitioned the District Court for reorganization under §77 of the Bankruptcy Act of 1898, 11 U.S.C. §205. In July of 1979, the District Court determined that there was little or no hope of a successful reorganization. In the Court's view, farther operation of the NYS&W in the public interest with no significant purpose towards reorganization would erode the collateral of secured creditors in a manner contrary

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* The opinion is reported as *In the Matter of the New York Susquehanna and Western R. Co.*, 504 F. Supp. 851 (D. N. J. 1980).

to the Fifth Amendment (Ja80 to Ja82).* The District Court accordingly entered Order No. 81 directing the Trustee to cease operations within a reasonable time and thereafter to commence an orderly liquidation of the debtor's assets (Ja83 to Ja85). Motions to reconsider were denied by Order No. 83, entered on August 23, 1979. The District Court did, however, modify its previous order by directing the Trustee to file his proposed plans for cessation of operations and liquidation with the Interstate Commerce Commission (ICC) and the New Jersey Department of Transportation so that the Court would have the benefit of the views of these regulatory agencies in implementing its prior order (Ja166).

The Trustee thereafter filed an application with the ICC for authority to abandon the entire NYS&W system pursuant to 49 U.S.C. §10903. On October 15, 1979, the ICC rejected the application because the Trustee had not complied with the notice provisions of the statute (Ja506). Two days later, the Trustee sought an exemption from the aforesaid notice requirements (Ja505), and the ICC, by order dated December 7, 1979, dismissed the exemption petition as moot because of the recent enactment of the MRRA, 45 U.S.C. §901 *et seq.* Section 17(a) of the MRRA transferred jurisdiction to authorize abandonments from the ICC to the §77 reorganization court acting with the advice of the Commission. In January 1980, the Trustee filed an entire line abandonment application with the ICC pursuant to §17(a) of the MRRA.

The New Jersey Department of Transportation (NJ DOT) and other interested parties, including the RLEA, filed appeals with the United States Court of Appeals for

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* "Ja" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

the Third Circuit from the District Court's Orders No. 81 and No. 83. While the appeals were pending, the NJDOT acted to avoid the loss of the vitally needed NYS&W rail service. NJDOT solicited statements of interest and proposals from persons interested in purchasing the NYS&W after its abandonment by the Trustee and interested in continuing rail service (Ja305). Approximately one dozen responses were received and reviewed by the Trustee who determined that three proposals, including that of the Delaware Otsego Corporation, presented viable offers.

The District Court convened a hearing on April 15, 1980 to consider the three offers. In an opinion dated May 20, 1980, the Court concluded that the Delaware Otsego offered the estate the largest amount of cash, that it was economically viable, that it had the ability to provide rail service on all of the NYS&W lines and that it would retain a significant portion of the debtor's employees. By Orders No. 101 and No. 103, the Trustee was directed to complete all necessary abandonment procedures by July 10, 1980 and to cease operations on August 29, 1980. The Delaware Otsego was ordered to commence operations on September 2, 1980 after finalization of a contract of sale. On August 12, 1980, the ICC issued its reports under §17(a) of the MRRA approving the abandonment of the NYS&W (Ja506). The ICC thereafter issued orders authorizing the Delaware Otsego and a newly incorporated subsidiary, the new NYS&W, to operate service over the tracks of the NYS&W.

In the contract of sale, approved in Order No. 104, the Delaware Otsego agreed to hire between 30 and 40 of the 57 employees working for the debtor, stated it would not assume the debtor's union contracts, and agreed to provide certain monetary benefits to employees not hired by it when it commenced service. The contract also

contained a contingency providing that the necessary regulatory approvals for the transaction not materially increase the cost of the transaction to the Delaware Otsego or the new NYS&W including any condition requiring the Delaware Otsego or the new NYS&W to make any payments to employees of the NYS&W, the Delaware Otsego or the new NYS&W other than those specified in the contract (Ja256).

RLEA appealed Orders No. 101 and No. 103 which authorized the abandonment. These appeals were consolidated with those previously taken from Orders No. 81 and No. 83.* On September 30, 1980, the Court of Appeals affirmed Orders No. 81 and No. 83 (App. E), and dismissed the RLEA's appeals from Orders No. 101 and No. 103 without prejudice. The Court of Appeals noted that the District Court had not ruled on the issue of labor protection and that the RLEA could raise these issues in the context of the hearings scheduled on the plan of liquidation (App. F).

At the hearing held before the District Court on September 23, 1980, evidence was presented that only 24 or 25 persons were employed by the NYS&W on the day

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* At oral argument before the Third Circuit, NJDOT took the position that it was satisfied with the abandonment and subsequent sale to the Delaware Otsego and wished to assert its objections to the District Court's orders mandating cessation of operations and liquidation only if the transaction with the Delaware Otsego was not completed (App. E at 56a to 57a). RLEA insisted that Orders No. 81 and 83 be vacated since, it was said, the District Court was, at the time of entry of the orders, without power under §77 to order an abandonment. Recognizing that such power was expressly granted in the MRRA, the RLEA argued that only if the orders were set aside and the District Court required to begin anew under the MRRA could the labor protections allegedly required by the Act be made effective (App. E at 57a).

it ceased operations (Ja354). This reduction in work force was due to attrition, technological improvements, job eliminations and the loss of business (Ja354 to Ja355). Of those employees still working for the debtor, all but one agreed to work for the new NYS&W. Persons who were eligible for lump sum separation payments had received them and had executed releases of certain wage claims (Ja358 to Ja359). The employees were paid substantially the same wages and received substantially the same benefits from the new NYS&W as they did when employed by the Trustee (Ja356).

In an opinion filed on November 18, 1980, the District Court concluded that employee protection arrangements would not be imposed upon any party including the Trustee, the Delaware Otsego or the new NYS&W. The transaction was a complete abandonment by the Trustee pursuant to §17(a) of the MRRA followed by the sale of the abandoned assets to a new carrier. Neither §17(a) nor prior ICC and judicial decisional law mandated the imposition of labor protection; rather, the matter was within the discretion of the §77 reorganization court. Finding the imposition of labor protections not warranted by the facts and circumstances of the case, the District Court rejected the RLEA's demand for their imposition (App. B-2). These conclusions were embodied in Order No. 109 (App. B-1).

On December 27, 1980, the ICC certified the plan as being in compliance with §77 of the Bankruptcy Act. The ICC reiterated its view, initially stated in its order approving the Trustee's abandonment, that the transaction between the Trustee, the Delaware Otsego and the new NYS &W was an abandonment within the meaning of §17(a) of the MRRA and not a sale under §17(b). Like the District Court, the ICC concluded that labor protections need not be made a part of the liquidation plan noting that "the

record before us fails to show how the employees of the Susquehanna will be harmed by DO's acquisition." (App. D, 48a). The District Court subsequently conducted another hearing on the plan and, by Order No. 113 entered on April 14, 1981, approved the plan over the RLEA's objection that it must include provisions for labor protections (App. C-2). RLEA's appeals to the Court of Appeals from Orders No. 109 and No. 113 were decided on November 16, 1981. Both orders were affirmed essentially for the reasons given in the District Court's opinion of November 18, 1980 (App. A).

ARGUMENT

The Petition for a Writ of Certiorari should be denied because the Court of Appeals for the Third Circuit, like the District Court, correctly determined that the Milwaukee Railroad Restructing Act did not require the imposition of labor protections in this proceeding and because the decision of the Court of Appeals in this regard does not present an important question of federal law which should be settled by this Court.

The rules of this Court governing review on writ of certiorari make plain that review will be granted only "when there are special and important reasons therefor." Sup. Ct. R. 17.1 In this case, the Court of Appeals affirmed the District Court's conclusion that the NYS&W Trustee's total cessation of operations and liquidation of the NYS&W was an abandonment within the meaning of §17(a) of the MRRA, that §17(a) did not mandate the imposition of labor protections in a total system-wide abandonment of a railroad, and further that the facts and circumstances of this particular reorganization did not warrant the imposition of labor protections

upon the debtor's estate or upon any other party to the proceeding. Notwithstanding the petitioner's arguments to the contrary, the decision of the District Court was clearly correct and there are no special and important reasons to justify further review by this Court.

A. The Court of Appeals, in construing §17(a) of the MRRA not to require the imposition of labor protections in a total system-wide adbandonment, interpreted the statute in a manner wholly consistent with the intent of Congress.

As the petitioner is compelled to concede, the decision of the Third Circuit construing §17(a) of the MRRA not to require the imposition of employee protection in a total system-wide abandonment of a railroad is not in conflict with a decision on this same issue by any other Court of Appeals. Indeed, the decision of the Third Circuit was entirely consistent with that rendered by the Court of Appeals for the Seventh Circuit in the Rock Island reorganization. *See In re Chicago, Rock Island & Pac. R.,* Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. Decided October 13, 1981), pet. for *cert.* pending *sub. nom, Railway Labor Executives' Ass'n* v. *Gibbons,* No. 81-1805. The Interstate Commerce Commission, too, concurred in the District Court's conclusion that §17(a) of the MRRA did not require the imposition of protective conditions in this case (App. D. at 45a). Ironically, it is the very uniformity of these decisions, not their inconsistency, which the RLEA contends renders the legal question presented under §17(a) of special importance. Simply stated, it is the RLEA's position that these decisions are uniformly incorrect and represent a judicially legislated departure from what is asserted to be an unequivocal Congressional mandate. To the contrary, the decisions below are wholly

consistent with the legislative intention which underlies the enactment of the MRRA.

There is no more fundamental principle of statutory construction than that requiring the courts to give effect to the intention of Congress. *United States* v. *American Trucking Ass'n,* 310 U.S. 534, 543 (1940). In discerning the intent of Congress, the starting point is the language of the statute. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 198 (1976). But, however clear the words of an enactment may be on "superficial examinations", there is no bar to the consideration of legislative history as an aid to construction. *United States* v. *American Trucking Ass'n, supra* at 544. The plain meaning rule is not, as was said in *Boston Sand Co.* v. *United States,* 278 U.S. 41, 48 (1928), a rule of law but rather an axiom of experience. As an aid to construction, the rule "can never override clear and contrary evidences of Congressional intent." *Neuberger* v. *Comm. of Internal Revenue,* 311 U.S. 83, 88 (1940).

The conclusion reached by the courts below that §17(a) of the MRRA did not mandate the imposition of labor protections in a total system-wide abandonment was squarely in accord with the intent of Congress. In §17(a), Congress empowered the reorganization courts to authorize the abandonment of railroad lines in cases then pending under §77 of the Bankruptcy Act. This power had previously resided with the Interstate Commerce Commission. The legislative history of the MRRA makes clear that while the statute stated that the §77 reorganization court "shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code," it was the expressed intention of Congress that §17(a) work "no change in ex-

isting law as it affects employee protection." H.R. Report No. 96-583, 96th Cong., 1st Sess. at 27 (1979); 2 U.S. Code Cong. & Ad. News 1747, 1759 (1979).

The existing law concerning the imposition of labor protection in the context of a total abandonment of a railroad was well established at the time of the enactment of the MRRA. In reviewing applications for total abandonments under former §1(18) of the Commerce Act, the ICC consistently refused to exercise its discretion to impose labor protections upon the abandoning railroad. *Tennessee Central Ry. Co. Abandonment,* 333 ICC 443 (1968); *Okmulgee Northern Ry. Co. Abandonment,* 320 ICC 637 (1964). The ICC concluded that the imposition of protective conditions would not strengthen the national transportation system. A departure from this principle required a showing of special circumstances evidenced by clear and convincing proof. *Id.* at 645-646. The ICC further concluded that where the carrier was in reorganization and where its creditors have suffered substantially, it would be inequitable and unwarranted to require further consumption of the railroad's assets for the payment of employees after it ceased operation. The result was justified because, despite straitened circumstances, the railroad had provided regular employment to its work force prior to abandonment. *Tennessee Central Ry. Co. Abandonment, supra* at 453-454.

When, in 1976, Congress amended the Interstate Commerce Act by its enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter the "4R Act"), Pub. L. No. 94-210 (1976), Congress redesignated §1(18) as §1(a), which has since been recodified as 49 U.S.C. §§10901-10907, and provided that each certificate of abandonment issued by the ICC should contain protective conditions at least as beneficial as those prescribed

by the former §(5)(f) of the Commerce Act (now 49 U.S.C. §11347). However, Congress made plain that it had absolutely no intention of altering "the practice and policy of the Commission in connection with certificates involving total termination of service by a railroad company." S. Rpt. No. 94-595, 94th Cong., 2nd Sess. at 218-219 (1976); 2 U.S. Code Cong. & Ad. News 148, 233 (1976). *See also* H.R. Rpt. 94-781, 94th Cong., 2d Sess. at 218-219 (1976).

The decisions of the ICC rendered subsequent to the enactment of the 4R Act were entirely in conformity with the expressed intention of Congress. In *Wellsville, Addison and Galeton R. Corp.—Abandonment of Entire Line,* 354 ICC 744 (1978), the Commission rejected the imposition of protective conditions in a total system-wide abandonment. So, too, in *Northampton & Bath R. Co. Abandonment,* 354 ICC 784 (1978), the Commission reviewed the legislative history of the 4R Act and again concluded that the 4R Act did not "curtail the Commission's discretion regarding protective conditions in entire line abandonments." *Id.* at 785. The Commission again restated its long standing rationale for refusing, in the absence of a showing of special circumstances, to impose labor protections in this context:

> . . . After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease. . . . [*Id.* at 785-786]

Thus, when Congress enacted the MRRA in November of 1979, the existing law as it relates to the imposition of labor protections in a total system-wide abandonment was clear. The RLEA can point to absolutely no legislative history to support its view that Congress, in enacting the 4R Act, sought to alter the longstanding ICC practice and policy concerning labor protection in total abandonments. Indeed the legislative history leads to the opposite conclusion. Since Congress in enacting the MRRA again indicated its intention that there be no change in the existing law concerning labor protection, the prior ICC practice and policy was carried forward and applied, as the courts below correctly held, to any court ordered system-wide abandonment of a railroad pursuant to §17(a).*

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* The legislative history of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §1001 *et seq.* lends considerable support to the District Court's analysis of §17(a) of the MRRA. When the Rock Island Act was before the Senate, Senator Kassenbaum stated that in the MRRA Congress intended to provide labor protections consistent with past ICC practice. She indicated in many instances, some involving small carriers:

> . . . where complete termination of service, probably because large protective standards are simply not a practical alternative, the Commission's practice has been to impose no employee protection in those limited cases. All of this customary practice is kept in place [by the MRRA and the Rock Island Act]. [Congressional Record, May 22, 1980, S5806]

The legislative history of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (1980), also makes plain that Congress did not intend to impose protective provisions on any other than "major" carriers. The colloquy between Representatives Lee, Florio and Madigan quoted in the District Court's opinion is quite clear on this point (App. B-2 at 26a-27a). See also H. Rpt. 96-1430, 96th Cong. 2nd Sess. at 138-139, 4 U.S. Code Cong. & Ad. News 4110, 4170-4171 (1980). The NYS&W is a Class III carrier and, as such, is not a "major" carrier.

The District Court's decision not to exercise its discretion under §17(a) and impose protective conditions, too, was consistent with existing law for there were no special circumstances which would warrant their imposition. *Okmulgee Northern Ry. Co. Abandonment, supra.* The Trustee's abandonment and cessation of operations was constitutionally compelled. Throughout the reorganization proceedings, employees of the NYS&W benefited from continued employment. All but one of the people employed by the Trustee on the date he ceased operations were hired by the new carrier. Wages paid by the new NYS&W are substantially the same as those paid by the Trustee. All fringe benefits are to be provided by the new carrier and are equal to or superior to those provided by the Trustee (App. B-2 at 14a-15a).

What is more, when the acquisition by the new NYS&W is complete, there will be only $6,742,595 to distribute to those with claims against the estate (App. C-2 at 36a). That amount is not sufficient for payment of all secured claims and no payment will be made of claims of lesser priority. Even so, employees of the debtor will be receiving a sum of about $891,189 for accrued and unpaid wage increases (Ja470). Clearly, on the basis of these facts, there was no basis for further consumption of the estate's assets for the payment of employee protection. The District Court certainly did not abuse its discretion in so concluding.

B. The Court of Appeals correctly determined that the Trustee's liquidation of the NYS&W was an abandonment within the meaning of §17(a) rather than a sale or transfer within the meaning of §17(b) of the MRRA.

The Third Circuit's conclusion that §17(a) of the MRRA applied in the case of a complete abandonment of a rail line followed by subsequent acquisition of the line by a non-carrier was in accord with the decision of the Court of Appeals for the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pac. R.*, 658 F.2d 1149, 1166-1176 (7th Cir. 1981), *cert.* den. *sub. nom Railway Labor Executives' Ass'n* v. *Ogilvie*, No. 81-1250 (U.S. L.W. March 8, 1982). The Seventh Circuit decided that §5(a) of the MRRA, a provision analagous to §17(a) but applying solely to the Milwaukee reorganization, governed the abandonment of certain lines of the Milwaukee. These abandonments were followed by subsequent acquisitions by entities which had never operated as rail carriers. The Seventh Circuit, like the Third Circuit, expressly rejected the view that transactions of this sort are "sales or transfers" rather than "abandonments." The decisions of the Courts of Appeal are uniform and, it is submitted, uniformly correct.

It is well settled that discontinuance of operations by a Trustee constitutes an abandonment. *Smith* v. *Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 328 U.S. 123, 130 (1946). Abandonment is characterized by the intention of the carrier to permanently cease all transportation service on its lines. *ICC* v. *Chicago & Northwestern Transportation Co.*, 533 F.2d 1025, 1028 (8th Cir. 1976). In the instant matter, the Trustee of the NYS&W was compelled by the Court to cease operations and liquidate the debtor's assets, since, it was determined, further operations would contravene the Fifth Amendment. This is unquestionably an "abandonment" within

the meaning of §17(a). The fact that a non-carrier is acquiring the line as part of the court ordered liquidation does not turn this transaction into a "sale or transfer" within the meaning of §17(b).

Under the Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, applications to abandon a railroad line were filed under 49 U.S.C. §10903, formerly §1(18). Applications for consolidation, merger or purchase of property of a carrier *by another carrier* were filed under 49 U.S.C. §11343. In *Okmulgee Northern Ry. Co. Abandonment, supra,* the ICC concluded that applications could be filed under §1(18) for abandonment along with an application by a *non-carrier* to acquire and operate portions of the line to be abandoned. Such a transaction, the Commission held, was not a merger or consolidation pursuant to §5(2). As the Commission stated:

> . . . There is no consolidation of carrier interests, or joining of two or more carriers, with consequent temporization of competition. There is merely the expiration of one carrier which, because of business adversity, is no longer able to successfully compete; and the willingness of another to move into the vacuum to the extent some need might remain for rail service. [*Id.* at 539.]

This distinction in the Commerce Act was carried over to the MRRA. Section 17(b) thus speaks in terms of the "purchasing carrier" and plainly applies only to sales to existing carriers. Section 17(a) applies to all abandonments irrespective of whether a new carrier acquires the property to be abandoned. There is absolutely nothing in the MRRA to suggest that the drafters of §17(a) intended that an abandoning railroad could not sell its assets to a new entity which would thereafter commence operations over the abandoned property. Such a construction

would totally undermine the important national policy of promoting a viable national rail system.

It should be added, as well, that there is nothing in the MRRA or its legislative history which would suggest that Congress intended to legislate any fundamental change in the existing law concerning employee protection. Under prior law, as the Seventh Circuit indicated in *Milwaukee,* when a non-carrier acquires a line from an abandoning carrier, protective conditions would generally be imposed upon the abandoning carrier except, as argued above, in a total system-wide abandonment. *Milwaukee, supra* at 1169. Sales and transfers between an abandoning carrier and an existing carrier are treated as unifications and the purchasing carrier, as well as the abandoning carrier, may be charged with responsibility for labor protection. *Id.* at 1169-1170. RLEA's argument that §5(b) and §17(b) apply to non-carrier purchasers of abandoned lines would, as the RLEA conceded before the Seventh Circuit, "extensively modify" existing law. *Id.* at 1172. The *Milwaukee* court rejected the view that so fundamental a change was intended by Congress. The Court made plain that prior practice and decisional law did not support the view that §5(a) was rendered irrelevant "when an abandonment is followed by a sale to a non-carrier." *Id.*

The Seventh Circuit in *Milwaukee* went on to state that, if successful, the RLEA's argument would undermine the policy of the MRRA to promote continued rail service. As the Seventh Circuit indicated:

> The record indicates that if RLEA is correct in its view of Section 5(b)'s applicability, the acquisitions at bar would not have occurred, as the states and other non-carrier entities would be required to divert scarce investment and start-up funds to finance em-

> ployee benefits, wage rates, and other conditions without regard to the extent the conditions are mandated by existing market conditions. If the acquiring entities are burdened with these requirements, future rail service over many of the lines, as the record reveals, would be rendered wholly unfeasible. [*Milwaukee, supra* at 1173]

The above has pertinence to this proceeding for if §17(b) applies and requires payment of labor protection by the new NYS&W, there will be no acquisition at all. The employees will be out of work and the region will lose a vital rail link. Such an absurd and unreasonable result would not have occurred under past ICC practice, and the MRRA did not require such a result in this case. The courts below correctly determined that §17(a) applied to the Trustee's abandonment and liquidation of the debtor's properties.

C. This case presents no constitutional issues of substantial importance or any other special or important reasons requiring plenary review by this Court.

Endeavoring to characterize this case as one of major significance, the petitioner suggests that this case implicates the Congress' power under the Constitution to legislate on the subject of the protection of employees affected by the liquidation of a railroad. It is said that the sole justification for the construction of the MRRA adopted by the courts below was that §17(a) of the MRRA would be unconstitutional if interpreted as the RLEA says it must be interpreted (Pet. for Cert. at 15). There is, of course, nothing in the opinion of the District Court to support the view that its construction of the MRRA was constitutionally compelled. To be sure, the District Court did con-

clude in July of 1979, relying upon *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920), that continued operation of the NYS&W in the public interest would run afoul of the Fifth Amendment (App. B-2 at 6a). This was merely one of several factors weighed by the District Court in deciding whether, as an exercise of discretion, protective provisions should be imposed. However, in deciding whether, in the first instance, the reorganization court had discretion under §17(a) to impose or decline to impose labor protections, the District Court did not base its decision on any provision of the Constitution.

The petitioner concedes as much by stating that these constitutional questions are "lurking" in this case. (Pet. for Cert. at 21). It is, however, error to anticipate constitutional questions the resolution of which may never be required. Even if the MRRA is read to require the imposition of labor protections and is further read to impose the costs of labor protection upon the abandoning carrier, the question would remain as to what priority should be accorded to these claims.* Only if these costs were deemed to be costs or expenses of administration within the meaning of §77(e)(3) of the Bankruptcy Act would they be of sufficient priority to receive payment. The MRRA did not provide that the costs of labor protection imposed under §17 would be expenses of administration. Section 17(e) expressly states that nothing in §17 shall be deemed "to affect the priorities or timing of payment of employee protection which *might* have existed in the absence of this Act." (Emphasis added) The priority, if any, of labor protective costs imposed under §17 of the MRRA would have to be decided according to settled §77 principles. Since the District Court could, applying the

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* The District Court expressly declined to rule on this issue (App. B-2 at 28a).

general principles set forth in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), decline to grant administrative cost priority to the labor protections, they would not be paid and the constitutional questions which might otherwise be presented by their payment would be moot.

In summary, the petitioner has utterly failed to demonstrate any special and important reasons to justify further review on writ of certiorari. The Court of Appeals for the Third Circuit correctly decided the statutory questions raised below, and its decision is not in conflict with that of any other Court of Appeals. Furthermore, this case presents no constitutional question let alone a constitutional question of substantial importance. Clearly, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Opposition

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NO. 81-1715

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company; NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT-DEBTOR, NEW YORK SUSQUEHANNA & WESTERN RAILROAD COMPANY IN OPPOSITION

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Counter-Statement of Questions Presented for Review

1. Whether the Third Circuit Court of Appeals correctly affirmed the findings of fact and ruling of the Reorganization Court that the liquidation of the assets of the Debtor, New York, Susquehanna & Western Railroad Company, the total cessation of all its operations, and the sale of its assets to a non-carrier constituted a total line abandonment governed by Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §915(a) [hereinafter "MRRA"].

2. Whether the Third Circuit Court of Appeals correctly affirmed the Reorganization Court's exercise of discretion in declining to impose labor protection provisions in the Second Amended Plan of Liquidation.

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BRIEF OF RESPONDENT-DEBTOR, NEW YORK SUSQUEHANNA & WESTERN RAILROAD COMPANY IN OPPOSITION

Counter-Statement of the Case

The present matter arises out of an application on January 20, 1976 by Respondent-Debtor, New York, Susquehanna & Western Railroad Company ["Debtor"] for reorganization pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. Section 205 (repealed). By Order No. 81, the United States District Court for the District of New Jersey ["Reorganization Court"] directed on July 16, 1979 that the Trustee cease operations of the Debtor within a reasonable time and thereafter commence orderly liquidation of the Debtor's assets. This Order was premised on the observation of the Reorganization Court that "[t]he various financial statements and reports before [the Court] paint a bleak picture," and its conclusion that ". . . continued operation of the [Debtor] erodes the collateral of the creditors and *serves no significant purpose towards reorganization.*" On August 23, 1979, the Reorganization Court denied various motions for reconsideration of its Order No. 81, while explaining in its subsequent Opinion that "[t]he court is quite mindful of the impact of such a decision [to discontinue operations of the Debtor] upon employees, shippers, and industry in the area in general." The Reorganization Court thus directed the Trustee to file a "proposed Plan of Liquidation and application for cessation of operations and abandonment of the Debtor Railroad" with the Court, the Interstate Commerce Commission ["ICC"] and the New Jersey Department of Transportation ["NJDOT"]. (Order No. 83). Both Orders of the Reorganization Court were affirmed by the United States Court of Appeals for the Third Circuit on September 30, 1980. (App. E at 55a-59a). The Court of Appeals determined that the Reorganization Court's findings of fact, including its conclusion that no feasible plan for the continuation of the Debtor's opera-

tions on a sound financial basis had been proposed, were supported by adequate evidence. *Id.* at 58a. Following necessary applications by the Trustee, the ICC authorized abandonment under Section 17(a) of the MRRA on August 12, 1980. Thereafter, the NJDOT recommended the issuance of a certificate of public convenience and necessity allowing abandonment by the Trustee, after adopting the decision of the Administrative Law Judge who conducted independent hearings. On August 29, 1980, the Trustee served notice of intent to abandon, and abandoned service on the Debtor's line in compliance with the Orders of Reorganization Court.

Pursuant to the direction of the Reorganization Court to commence orderly liquidation of the Debtor's assets, the Trustee solicited and submitted to the Court several offers to purchase said assets, free and clear of the liens which would attach to the proceeds of the sale. Following extensive opportunities for ali interested parties, including Petitioner herein, to appear and to submit their views, the Court rendered findings of fact in an Opinion filed May 28, 1980. The Court observed first that, in evaluating liquidation plans, it was obliged to take into account the interests of the creditors, the labor unions and the public interest in continued rail service. Additionally, one of four major factors which qualified the submitted offers for serious consideration was that the offeror make a commitment to retain a significant portion of the Debtor's current employees after the sale. Of the three offers under consideration, the Reorganization Court concluded that the offer of the Delaware Otsego Corporation ["DO"] was the best proposal for the Debtor's estate for the reasons, *inter alia,* that its proposal was a complete cash transaction involving no contingent financing, and that ". . . DO has made significant commitments to the present employees of the Debtor which, although not fully

satisfying the unions involved, present logical solutions in an attempt to revamp the operation of a failing railroad." The Trustee was thus directed to accept the offer of the DO. (Order No. 101). On August 5, 1980, the Reorganization Court approved the Agreement of Sale between the Trustee and the New York, Susquehanna & Western Railway Corporation ["New NYS&W], a subsidiary of DO. (Order No. 104).

Various applications were subsequently submitted to the ICC: by the Trustee for abandonment, and by the New NYS&W for a certificate of public convenience and necessity authorizing the acquisition and operation of the lines of railroad being abandoned by the Debtor. On August 12, 1980 the ICC recommended to the Reorganization Court that the Trustee be permitted to abandon, and concluded that said proceeding was governed by Section 17(a)(1) of the MRRA. (App. D 41a). Also pursuant to Order No. 101 of the Reorganization Court, the Trustee submitted two Amended Plans of Liquidation to the ICC, which indicated its Agreement with DO and New NYS&W to acquire the physical assets of the Debtor and to operate rail freight service over its lines, subject to regulatory approval. Petitioner RLEA objected to these Plans on the grounds that they should be conditioned on the requirement of employee protection measures specified in Section 17(b) of MRRA and 49 U.S.C. 11347. The ICC eventually concluded that the Trustee's Plans met the requirements of Section 77 of the Bankruptcy Act, and that they were compatible with the public interest. The ICC also rejected the assertion of RLEA that the liquidation Plans should include employee protective provisions.

While the Second Amended Plan of Reorganization was pending before the Reorganization Court, an evidentiary

hearing was held on September 23, 1980 on the issue of whether the court must impose certain labor provisions as a condition of approval of the Plan. Noting that it had ". . . repeatedly concluded that there is no possibility that the Debtor can continue to operate under present conditions, given the deterioration of its physical plant and its untenable financial position," the court rendered the following findings of fact and conclusions of law. First, it observed that a condition precedent to closing under the Agreement between the Trustee and DO was final judicial and regulatory approval of the transaction, *without* conditions materially increasing the cost of the transaction to the offeror; this condition specifically included any requirement of payments to employees other than those specified in the Agreement of Sale. (App. B-2 at 9a). For this reason, the Court concluded that, if labor protection were imposed, the transaction would not occur, and the Debtor's former employees ". . . would lose their jobs and still be without protection." *Id.* at 20(a).

Secondly, while the Debtor employed 59 people at the commencement of 1980, that number was reduced to 24 or 25 by August 29, 1980, the date on which the Trustee terminated the Debtor's operations pursuant to the Order of the Reorganization Court; petitioner concedes that "[t]his reduction in employment occurred as a result of attrition, retirements, technological improvements and job abandonments." (Petition at 8 n.8.). More importantly, of the 25 persons remaining in the Debtor's employ on that date, 23 were hired by the New NYS&W. After one of the remaining former employees died, there was only a single person who was not hired by the new carrier, but who, as the Court noted, is receiving benefits from DO. Further, between 15 and 18 employees of the Debtor executed general and complete releases of all of

their claims prior to the date of cessation of operations; the Reorganization Court concluded that those employees left the Trustee's employment voluntarily and, in so doing, manifested an unwillingness to work for the new carrier. Finally, the Court found that the duties of the Debtor's former employees did not change as a result of their employment by DO, that no employee was compelled to perform work that was undesirable or beyond his physical capacity, that hourly wage rates paid by the new carrier were equal to or higher than those paid by the Trustee, and that all fringe benefits were provided by the new carrier and were equal to or superior to those provided previously.

The Reorganization Court also concluded, as a matter of law, that the abandonment of the Debtor's operations in this instance was followed by, and was a part of a liquidation of the Debtor, rather than a sale or transfer. In this regard, it was noted that the Trustee was bound to abandon the line and terminate all services regardless of whether a transaction with any new carrier was accomplished. The Court also found that, prior to its takeover of the Debtor's line, the New NYS&W had never operated as a carrier. Since it was faced with a total line abandonment, therefore, the Reorganization Court concluded that the imposition of labor protection provisions as a condition of the transaction was discretionary rather than mandatory, and, for the reasons set forth above, it declined to impose same. (App. B-2 at 5a-28a).

The Trustee's Second Amended Plan of Liquidation was certified by the ICC on December 27, 1980, in an opinion which reiterated its previous conclusion that the proceedings in question were an abandonment under Section 17(a) of the MRRA. Further, the ICC also observed that ". . . the record before us fails to show how employees of the

Susquehanna will be harmed by DO's acquisition." (App. D at 48a). Atfer conducting a hearing on March 24, 1981, the Reorganization Court issued an Order approving the Plan. (App. C-1 at 29a). The Orders of the Reorganization Court denying labor protection and approving the Plan were affirmed by the Third Circuit Court of Appeals on November 16, 1981. (App. A at 1a). The instant Petition for a Writ of Certiorari seeks review by this Court of that judgment.

Reasons of Denying the Writ

The Rules of this Court, and considerable precedent decided thereunder, indicate clearly the circumstances under which a Writ of Certiorari may be granted. Specifically, Rule 17 provides that the Writ ". . . is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." The Rule also illustrates the character of reasons pertinent hereto which will justify such an exercise of discertion: where a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; where it has ". . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision;" or where it has ". . . decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." For the reasons which follow, Respondent-Debtor submits that none of the aforementioned considerations ordinarily justifying the exercise of Certiorari jurisdiction by this Court exist in the instant matter, and that the Petition should accordingly be denied.

1. The Courts of Appeals which have addressed the issues presented by the present Petition are in complete accord.

The decision of the Third Circuit Court of Appeals [App. A at 1a], from which the present Petition seeks review by this Court, affirmed the opinion of the Reorganization Court essentially for the reasons set forth therein. (*Id.;* see 504 F. Supp. 851 (D.N.J. 1980)). As summarized *supra,* the Reorganization Court concluded that, since the matter before it constituted a total line abandonment governed by Section 17(a) of the MRRA, the imposition of labor protection provisions on the Agreement of Sale to the purchasing non-carrier was a matter within its discretion. One basis relied upon by the Reorganization Court, and adopted by the Third Circuit Court of Appeals, was that all existing precedent on that issue, including particularly a considerable body of decisional law emanating from the ICC, led uniformly to this conclusion. (App. B-2 at 25(a)).

A second, express basis for the affirmance of the Reorganization Court's decision by the Third Circuit Court of Appeals was the reasoning and conclusion, under nearly identical circumstances, of the Seventh Circuit Court of Appeals in *In re Chicago, Rock Island & Pacific R.R.,* (Nos. 80-1788, 2199, 2286, 7th Cir. 1981). The Seventh Circuit there concluded that the MRRA ". . . was not intended to work a change in existing law as it affects employee protection . . . and the existing law regarding labor protection includes the long established ICC practice of denying labor protection in total abandonments." *Rock Island, supra,* at 8.

The foregoing decisions by the Third and Seventh Circuit Courts of Appeals, which constitute the entirety of

decisional law by federal appellate courts on the issue of labor protection in cases of total line abandonment, are, self-evidently, in perfect harmony. Manifestly, this Court's power of supervision may not, therefore, be invoked on the ground that there are conflicting decisions by Courts of Appeals on the same matter.

2. The reliance by the Courts below on pertinent legislative history was entirely appropriate, and demonstrates no conflict with any decision of this Court.

In evaluating the reach of mandatory labor protection pursuant to the MRRA, the Reorganization Court (and, by adoption, the Third and Seventh Circuit Courts of Appeals) pursued a meticulous examination of an unusually extensive and completely consistent body of ICC precedent regarding the interpretation of the statutes in question. The uniform conclusion of such precedent is that, in cases of total line abandonment, the imposition of labor protection is discretionary. Petitioner, on the other hand, has urged throughout these proceedings that the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §801, *et seq.* ["4 R Act"] eliminated all such discretion under all circumstances. In rejecting this position, the Reorganization Court noted that ". . . this argument flies in the face of post-4 R Act ICC decisions denying labor protection in total abandonments . . ." (App. B-2 at 20a). Petitioner contends, nonetheless, that the courts below were precluded by the language of the statute itself from resorting in any way to legislative history for guidance in its application. Respondent-Debtor submits for the following reasons that this argument is entirely unfounded.

First, as noted, the Reorganization Court expressly relied upon the statutory interpretation developed by the ICC both prior to the 1976 amendments to the Interstate Commerce Act, 49 U.S.C. §10903(b)(2) and subsequently. It is, of course, entirely appropriate for courts to pay deference to the interpretation of a statute by the agency charged with its administation. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Lehigh & N.E.R. Co.* v. *I.C.C.*, 540 F.2d 71, 80 (3d Cir. 1976), *cert.* denied, 429 U.S. 1061 (1977). Prior to 1976, the ICC consistently took the position that the imposition of labor protection was discretionary in abandonment proceedings under former Section 1(18) of the Interstate Commerce Act, 49 U.S.C. §10903, and that it would not impose such provisions where a carrier was proposing to abandon its entire line. *Okmulgee Northern Railway Co. Abandonment*, 320 I.C.C. 637 (1964); *Manitee & Repton R. Co. Abandonment*, 320 I.C.C. 489 (1964); *Tennessee Central Railway Company Abandonment*, 333 I.C.C. 443 (1968).

The ICC interpretation of Congressional intent in the passage of 49 U.S.C. §10903(b)(2), which amended its prior authority in such matters, is consistent with the legislative history of this Section. That statutory interpretation by the I.C.C. was succinctly stated in *Wellsville, Addison, Galeton Railroad Corp.—Abandonment of Entire Line*, 354 I.C.C. 744 (1978). The I.C.C. therein declined to impose employee protective conditions in the context of an abandonment of an entire line, and stated:

> The precise language of Section 1A(4) of the Act [now 49 U.S.C. 10903(b)(2)] would appear to require imposition of employee protective conditions in all permitted abandonments. However, the legislative history of the 4 R Act and prior Commission precedent is clearly to the contrary. In

> the report of the Committee of Conference on the [4 R Act], Congress indicated that the precise language of Section 1(a)(4) was not intended to change the policy and the practice of the Commission in connection with certificates involving total termination of service by a railroad company.
>
> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of railroad's properties for the payment of employees after the railroad ceases operations.

Id. at 746 (citations omitted); see also *Northhampton & Bath Railroad Co. Abandonment,* 354 I.C.C. 784 (1978).

The Reorganization Court also looked to a joint statement of the House and Senate managers of the 4 R Act, which stated that 49 U.S.C. 10903:

> Required employee protection no less beneficial than that established under §5(2)(f) of the Interstate Commerce Act and §405 of the Rail Passenger Service Act, *but without intention to change the policy and practice of the [I.C.C.] in connection with certificates involving total termination of service by a railroad company.*

2 U.S.C. Code Cong. & Admin. News 233 (1976). (App. B-2 at 23a, emphasis supplied). In like measure, the Seventh Circuit Court of Appeals sought out and relied upon all available evidence of Congressional intent in interpreting the language of §17(a) of the MRRA. See *Rock Island Abandonment, supra,* at 8.

Petitioner has never argued that either the courts below or the ICC misread or erroneously applied the applicable legislative history. Instead, it argues, and asks this Court to rule that all such clear evidence of Congressional intent should have been wholly ignored by the administrative agency and, in turn, the courts charged with the statute's application. In the present petition particularly, it is urged that the mere reference to legislative history is somehow in conflict with decisions of this Court on the issue of statutory construction generally. The opposite, of course, is true; the essence of a court's function in interpreting a statute is to ascertain the purpose of the statute, to which the legislative history herein directly and informatively speaks. Respondent-Debtor accordingly submits that the entirely appropriate use of the legislative history by the court below constitutes no ground for the granting of the Writ of Certiorari.

3. The ruling of the Reorganization Court, as affirmed by the Third Circuit Court of Appeals, raises neither a Constitutional issue which this Court must address, nor a factual issue which it should resolve.

As set forth *supra,* the various decisions of the Reorganization Court and the ICC which resulted eventually in the approval of the Trustee's Plans of Liquidation were premised on findings, *inter alia,* that successful reorganization of the Debtor's operations was not feasible, that a total line abandonment was required under the circumstances, and that approval of the Agreement of Sale to the DO without imposition of labor protection was both permissible and would work no disadvantage to any former employee of the Debtor. Petitioner now contends that these conclusions raise both constitutional and factual issues which require examination and resolution by this

Court. For the following reasons, Respondent-Debtor submits that Petitioner's assertions in this regard furnish no basis whatsoever for the relief sought.

First, it is abundantly clear that the specific question presented herein—whether the Courts below correctly declined to impose labor protective conditions in the context of a total line abandonment—implicates no constitutional issue. On the contrary, while the Reorganization Court determined at the outset that continued operations by the Debtor with no prospect of successful reorganization was unwarranted in view of this Court's holding in *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920), its subsequent ruling regarding the imposition of labor protection rested exclusively on its interpretation of a federal statute. Petitioner itself concedes that the purported constitutional issues which ". . . lurk in the background" herein [Petition at 21] are at most purely hypothetical. That is, petitioner asserts that, should this Court conclude that the Reorganization Court *incorrectly* found that the Debtor was not reorganizable, then it must also conclude that it was powerless to prevent the unconstitutional taking of the creditors' property. This hypothesis, according to Petitioner, "squarely poses" the Constitutional issue of congress' power ". . . to regulate matters of employee-employer relations where the employer is a liquidating railroad." (Petition at 23). By its own terms, however, Petitioner's argument rests exclusively on a ruling which has *not* occurred, and the purported Constitutional issue is neither substantial nor ripe for decision.

Secondly, Petitioner now contends that the Reorganization Court in any event was without authority to liquidate the Debtor in this instance. Respondent-Debtor submits, however, that this contention was appropriately rejected by the Third Circuit Court of Appeals, which concluded:

> It is clear that even if we were to conclude that the District Court lacked authority to order an abandonment in July 1979 . . . the enactment of the Milwaukee Act granted it such power. Consequently, even if we were to accept the [RLEA'S] contention that the Orders of July and August 1979 were invalid, the District Court would be able to enter similar Orders on remand. Thus, in a practical sense, any validity to the [RLEA'S] argument has been nullified by the passage of the Milwaukee Act.

(App. E at 57A).

Finally, Petitioner's present argument that the transaction between the Trustee and the DO constituted, not an abandonment within the meaning of Section 17(a) of the MRRA, but a sale or transfer within Section 17(b) raises a purely factual issue, and it is neither the obligation nor the province of this Court to address it. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, there is absolutely no basis to conclude that that issue was incorrectly treated by the Reorganization Court. On the contrary, it is settled that discontinuance of operations by a Trustee is an abandonment. *Smith* v. *Hoboken Railroad W. & S. Co.*, 328 U.S. 123, 130 (1946). An abandonment is characterized by an intention by the carrier to cease permanently or indefinitely all transportation service on the relevant line. *ICC* v. *Chicago & Northwestern Transportation Co.*, 533 F. 2d 1025, 1028 (8th Cir. 1976). In the present matter, there has been no less than perfect consistency among the Reorganization Court, the ICC, the NJDOT, and indeed even the Petitioner during the proceedings below, that the Court-ordered liquidation of the debtor's operations constituted an abandonment. This conclusion is amply supported by the facts of record. Accordingly, Respondent-Debtor submits that an exercise of this Court's jurisdiction on this basis would be entirely inappropriate.

CONCLUSION

For all the foregoing reasons, Respondent-Debtor urges that the petition of RLEA for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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NO. 81-1715

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company, NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

Respondents.

BRIEF OF RESPONDENT, WALTER G. SCOTT, TRUSTEE OF THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Questions Presented for Review

The petition for a Writ of Certiorari filed herein by the Railway Labor Executives' Association (RLEA) presents the following questions:

1. Whether the lower courts were correct in holding that the Trustee's cessation of operations and abandonment of the debtor's railroad lines, and the sale of said lines to an entity intending to utilize same for railroad purposes, was governed by section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §915(a)?

2. Whether in approving the Trustee's Plan of Liquidation, the lower courts were correct in holding that the imposition of employee protection provisions was neither required nor appropriate?

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NO. 81-1715

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Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York, Susquehanna & Western Railroad Company, NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

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Respondent, Walter G. Scott, Trustee of the New York, Susquehanna and Western Railroad Company, respectfully submits this brief in opposition to the petition for a Writ of Certiorari filed by the Railway Labor Executives' Association (RLEA).

Opinions Below

In addition to the decisions and orders referred to at page 2 of RLEA's petition and reproduced at the appendices thereto, Respondent believes that reference to Orders No. 81 and 83 entered by the reorganization court on July 16, 1979 and August 24, 1979 respectively and to the reorganization court's unpublished opinions of July 12, 1979 and August 24, 1979 is germane to the Court's consideration of the petition. These orders and opinions are reproduced at Appendix A hereto.

Constitutional Provisions and Statutes Involved

This case involves the application and interpretation of Section 17 of the Milwaukee Railroad Restructuring Act (MRRA), 45 U.S.C. §915, in the context of a total abandonment of a debtor's railroad lines. This section is reproduced as Appendix G at page 63 of the Railway Labor Executives' Association's petition. The decision of the reorganization court to order the Trustee to cease operations and liquidate the debtor's assets was premised in part on the Due Process and Just Compensation clauses of the Fifth Amendment to the United States Constitution, and to the extent that the instant petition questions the lower court's characterization of the disposition of the debtor's lines as an abandonment, these clauses are also involved in this case. The relevant portions of the Fifth Amendment are set out at page 4, note 3 of the petition.

Counter-Statement of the Case

On January 20, 1976, the New York, Susquehanna and Western Railroad Company filed a petition for reorganization under section 77 of the Bankruptcy Act, former 11 U.S.C. section 205. On March 1, 1976, the reorganization court appointed Walter G. Scott as Trustee of the debtor's property.

As the reorgnization proceeding progressed, the Trustee filed various applications with the reorganization court seeking extensions of time in which to file a plan of reorganization and obtained orders granting the requested extensions. The last order so obtained was entered on January 29, 1979, and granted the Trustee an extension to file a plan until July 2, 1979.

On June 19, 1979 the Trustee applied for an additional six month extension within which to file a plan of reorganization. The reorganization court conducted a hearing on the Trustee's application on July 2, 1979, following which the court denied the Trustee's motion and ordered the cessation of the railroad's operations and an orderly liquidation of the debtor's assets.

On July 12, 1979, the reorganization court issued an opinion setting forth the basis of its ruling. After reciting what the court termed the "bleak picture" of the operational losses being sustained by the Trustee, the court concluded that continued operation by the Trustee was eroding the collateral of secured creditors without serving a significant purpose towards reorganization (Appendix A-2).

On July 16, 1979, the court entered Order No. 81, which directed the Trustee to cause the operations of the debtor to cease within a reasonable time and there-

after to commence the orderly liquidation of the debtor's assets under the continued jurisdiction of the court (Appendix A-1).

On August 24, 1979, the reorganization court issued an opinion denying the motion for reconsideration filed by RLEA (Appendix A-4). In this opinion, the court reiterated its conclusion that a feasible plan of reorganization was not possible and that continued operations were resulting in the unconstitutional taking of the property of the secured creditors. The court further directed the Trustee to file a proposed plan of cessation of operations and liquidation with the court and with the Interstate Commerce Commission (hereafter "the ICC" or "the Commission") by October 1, 1979. In addition, the court directed the Trustee to file with the ICC and with the New Jersey Department of Transportation appropriate applications requesting authorization to abandon the entire operation of the debtor.

On August 24, 1979, the reorganization court entered Order No. 83 embodying the rulings set forth in its opinion on the motion for reconsideration (Appendix A-3). RLEA lodged appeals with the United States Court of Appeals for the Third Circuit from Orders No. 81 and 83 on September 25, 1979. On September 30, 1980, the Court of Appeals affirmed the reorganization court's orders.

Complying with the court's directive, the Trustee filed a preliminary plan of liquidation on October 4, 1979. The Trustee also filed an application for abandonment with the ICC, which application was rejected by the Commission on October 15, 1979, on the grounds that the Trustee failed to comply with the notice requirements of 49 U.S.C. Subtitle IV and the regulations promulgated by the ICC at 49 CRF Part 1121.

On October 17, 1979, the Trustee filed a petition for exemption from the notice requirements. The ICC, however, in a decision served on December 7, 1979, dismissed the Trustee's petition as moot on the grounds that the ICC no longer had jurisdiction over the Trustee's abandonment application, jurisdiction having been transferred to the reorganization court pursuant to section 17(a) of the MRRA.

On January 2, 1980, the Trustee filed a new application to abandon service with the ICC, pursuant to section 17(a) of the MRRA and the ICC's regulations at 49 CFR 1121 Subpart F. The Trustee's application contemplated the total abandonment of and the cessation of service over the debtor's entire main railroad line and its three branch lines, with the exception of the Suscon Branch being operated by Conrail.

Following entry of Orders No. 81 and 83, the Trustee commenced his efforts to liquidate the debtor's assets. The Trustee's progress in this regard was reported to the court at a hearing conducted to consider the Trustee's preliminary plan of liquidation, conducted on January 7, 1980.

On January 10, 1980, the reorganization court entered Order No. 91, which directed all parties interested in submitting proposals to acquire the debtor's assets to submit same to the Trustee's counsel and the New Jersey Department of Transportation on or before January 18, 1980.

After considering the various proposals submitted by interested parties, the Trustee presented to the court what he considered to be the three best offers. One of the three offers was that of the Delaware Otsego Corporation (hereafter "D.O."). At the conclusion of the hearing the court directed that any interested party wishing to submit written comments on the offers do so by April 25, 1980.

The solicitation of offers to purchase the assets of the debtor and the court's consideration of the three offers presented by the Trustee was clearly part of the Trustee's ongoing efforts to comply with the court's mandate to liquidate the debtor's assets in an orderly fashion. No departure from the court's order to abandon the debtor's rail lines and cease operations was contemplated by any interested party or by the court. This is made clear by the actions of the RLEA itself, which in response to the court's directive to submit written comments filed with the court a Memorandum of Points and Authorities in which it stated that "the Trustee's recommendation to the Court, if approved, will certainly result in the 'abandonment of' the NYS&W Line."

On May 28, 1980, the reorganization court issued an opinion directing the Trustee to accept the offer submitted by the D.O. and its wholly-owned subsidiary, the New York Susquehanna and Western Railway Corporation (hereafter "New Susquehanna") to purchase substantially all of the debtor's assets. The New Susquehanna was not a common carrier at the time it contracted to purchase and operate the debtor's lines. At the same time the court reiterated its previous directive to the Trustee to abandon all operations of the debtor. The opinion also required the Trustee's amended plan of liquidation, which had been filed on March 4, 1980, to be further amended to incorporate the contract of sale between the Trustee, the D.O. and New Susquehanna.

On June 10, 1980, the court entered Order No. 101 approving the offer of the D.O. The order also directed the Trustee to revise or complete the abandonment applications (to the extent necessary) on file with the ICC and the New Jersey Department of Transportation. Both the Commission and New Jersey Department of Transporta-

tion were directed to submit reports to the court concerning the Trustee's application within thirty (30) days after receipt of same.

On June 30, 1980, the court entered Order No. 103 which required the Trustees to complete all filings for abandonment and termination of service with the ICC and New Jersey Department of Transportation by July 10, 1981, and to cease all rail operations effective 11:59 p.m. August 29, 1980. The New Susquehanna was directed to commence operations on September 2, 1980, under an interim lease with the Trustee.

The RLEA lodged appeals from Orders No. 101 and 103 with the Third Circuit, which appeals were dismissed without prejudice on September 17, 1980.

On July 11, 1980, the Trustee updated his abandonment application on file with the ICC advising the Commission that pursuant to the reorganization court's orders, he would terminate service effective August 29, 1980, and further advising that the court had approved the offer for the D.O. and New Susquehanna to acquire the debtor's assets in liquidation.

The contract between the Trustee, the D.O. and New Susquehanna was approved by the court on August 6, 1980, in Order No. 104. Said order reiterated the directive that the Trustee terminate service on the debtor's lines on August 29, 1980.

On August 12, 1980, the ICC issued a report recommending to the court that the Trustee be permitted to abandon the debtor's rail lines. The report held that it was "completely speculative and unrealistic" to expect the debtor to become profitable.

On September 23, 1980, the reorganization court conducted a hearing to consider the Trustee's plan of li-

quidation and the issue of whether or not the court was required to impose labor protection provisions, as urged by RLEA.

Following the hearing the court issued an opinion on November 18, 1980, holding that the Trustee's disposition of the debtor's assets constituted an abandonment rather than a sale or transfer, and was thus governed by section 17(a) of the MRRA. The court further held that this statute did not mandate imposition of labor protection requirements on any party. *In re New York, Susquehanna & Western Railroad Company*, 504 F. Supp., 851 (D.N.J. 1980).

In addition to finding that labor protection was not mandatory, the court carefully weighed the equities to determine whether it should impose labor protection in the exercise of its sound discretion. In this regard the court noted that the debtor had only 25 employees as of August 29, 1980, the date on which it ceased operations. Of these 25 employees, 23 were hired by the New Susquehanna when it commenced operations the following business day pursuant to its interim lease agreement with the Trustee. Since one employee died over the Labor Day weekend, only one person employed by the Trustee on the date he ceased operations was not hired by the new carrier. That individual was receiving benefits from the new carrier pursuant to the new carrier's purchase agreement with the Trustee wherein it agreed to pay benefits to displaced employees.

The court further found that although the job titles of the Trustee's former employees had changed, there had been no change in their duties, and that no employee was performing work he would rather not do or which was beyond his physical capacity. In addition, the court found that the hourly wage rates of the em-

ployees of the New Susquehanna were equal to or higher than those paid by the Trustee. Although the new carrier did not pay time and one-half for overtime, all fringe benefits provided by the Trustee were being provided by the new carrier and were equal or superior to those which had been provided by the Trustee. The court further noted that former employees were being given priority in filling positions on the new carrier.

The court also noted that prior to August 29, 1980, between 15 and 18 employees had voluntarily left the Trustee's employment after executing general and complete releases of all claims in return for a cash settlement. These releases, as the court found, were voluntarily and knowingly negotiated by the employees after they were advised that the cash received from the Trustee or D.O. was to be in complete settlement of all claims which they could have asserted.

The court further found the releases to be valid in all respects and noted that none of the employees who negotiated a settlement with the Trustee had complained of the results reached. Thus the court concluded that these employees had voluntarily left the Trustee's employment and manifested an unwillingness to work for the New Susquehanna.

Balanced against this clear finding that the debtor's employees had not been adversely effected by the Trustee's abandonment, the court noted that one of the conditions precedent to closing under the purchase agreement with D.O. was final judicial and regulatory approval of the transaction without the imposition of conditions materially increasing the cost of the transaction to D.O. or New Susquehanna, including conditions requiring D.O. or New Susquehanna to make payments to employees other than those specified in the purchase

agreement. This condition had been negotiated by D.O. based upon its voluntary agreement to provide certain protections to employees and its financial inability to absorb the costs of additional labor protection and at the same time provide service over the debtor's lines. Under the agreement, D.O. agreed to provide supplemental benefits to employees unable to find new jobs for a twelve month period following the Trustee's cessation of operations, up to a total of $5,000.00.

The reorganization court was thus confronted with a choice between imposing labor protection over and above that which the new carrier voluntarily agreed to provide, despite the lack of evidence that employees were being adversely affected, and thus potentially bring about termination of the purchase agreement, or declining to impose labor protection requirements and thereby insure continued operations over the debtor's lines and continued employment of all but one of the debtor's employees.

Faced with this alternative, the district court correctly exercised its discretion by refusing to impose labor protection requirements. This decision was consistent with controlling law, was clearly in the public interest, and has kept the debtor's lines in service to the present time.

On November 25, 1980, the reorganization court entered Order No. 109 consistent with its November 18, 1980 opinion. RLEA filed its appeal to the Third Circuit from this order on December 23, 1980.

On December 22, 1980, the ICC issued its Certificate Decision and Report with regard to the Trustee's plan of liquidation. *The New York, Susquehanna and Western Railroad Company, Debtor (Walter G. Scott, Trustee)—Plan of Liquidation,* 363 ICC 794 (1980). The ICC held that the Trustee's plan complied with all of the require-

ments of section 77 of the Bankruptcy Act, former 11 U.S.C. §205, and recommended that the reorganization court grant approval. In so recommending, the Commission rejected the RLEA's contention that the plan be modified to include employee protection provisions.

On March 24, 1981, the district court conducted a hearing to rule on approval of the Trustee's second amended plan of liquidation, which had been filed on August 5, 1980. The court again considered the contention of RLEA that the plan should not be approved without modifications imposing employee protection. This position was rejected in the court's opinion filed on April 9, 1981.

Order No. 113 approving the Trustee's plan was entered on April 14, 1981. RLEA lodged its appeal to the Third Circuit from this order on April 28, 1980, which appeal was subsequently consolidated with RLEA's appeal from Order No. 109.

On November 16, 1981, the Third Circuit issued a judgment order affirming the orders of the district court dated November 25, 1980 and April 14, 1981 "for essentially the reasons set forth in the district court's opinion at 504 F. Supp. 851 (D.N.J. 1980), *see also In re Chicago, Rock Island & Pacific R.R.*, Nos. 80-1788-2199-2286 (7th Cir. Oct. 13, 1981)."

Summary of Argument

I. The lower courts' characterization of the Trustee's disposition of the debtor's property as an abandonment was based upon the history of the reorganization proceeding, and in particular on the court's mandate to the Trustee to permanently cease operations and embark upon an orderly liquidation of the debtor's assets. Abandonments, even when coupled

with sale of the railroad lines, are governed by section 17(a) of the MRRA.

II. The lower courts' conclusion that section 17(a) of the MRRA does not require imposition of labor protection in the context of a total abandonment is supported by prior decisional law and legislative history, and is consistent with the decision by the only other federal court of appeals to have ruled on the issue.

III. Because the lower courts' decision mandating that the Trustee discontinue operations and liquidate the debtor's assets were premised on Fifth Amendment principles, no constitutional uncertainty exists in the instant case with respect to Congress' power to legislate labor protection.

ARGUMENT

The considerations governing review on Writs of Certiorari are set forth at Rule 17 of the rules of this Court. As stated in the Rule, a review on Writ of Certiorari is not a matter of right and will be granted "only when there are special and important reasons therefore". In the instant case, analysis of the lower courts' holdings reveals that none of the specific criteria set forth in Rule 17 are present and that no other special and important reasons exist for this Court to grant review on RLEA's petition.

I

The decision by the lower courts that the Trustee's disposition of the debtor's assets constituted an abandonment was based upon the particular facts of this case and raises no issues requiring resolution by this Court since it was consistent with well-established precedents.

The finding of the reorganization court that the Trustee's disposition of the debtor's assets constituted an abandonment governed by section 17(a) of the MRRA, rather than a sale or transfer governed by section 17(b) of that Act cannot be seriously questioned. As indicated in the Counter-Statement of the Case, above, the reorganization court ordered the Trustee to cease operations and conduct an orderly liquidation of the debtor's assets on July 16, 1979, sixteen months prior to entering Order No. 109 denying RLEA's contentions that controlling law required imposition of labor protection.

The district court's directive to liquidate the debtor's assets was based upon its finding, after an evidentiary hearing, that there was no realistic possibility of successfully reorganizing the debtor and that continued operations were unconstitutionally eroding the collateral of the debtor's secured bondholders.

Every subsequent order of the reorganization court, including its approval of the sale of the debtor's assets, was consistent with this holding based upon the finding that a reorganization was not possible.

The district court's holding that the Trustee's disposition of the debtor's assets constituted an abandonment was also entirely consistent with the definition of of abandonment provided by this Court in *Smith* v. *Hoboken Railroad, Warehouse and Steamship Connecting*

Co., 328 U.S. 123, 130, 66 S. Ct. 947, 951-52 (1946) wherein the Court stated:

> "Discontinuance of operations by the Trustee is abandonment of operations by a carrier within the meaning of §1(18) [of the Interstate Commerce Act]."

In *Smith*, this Court concluded that the Trustee's proposed cessation of operations constituted an abandonment despite the fact that the lessor of the subject lines evidenced a willingness to commence service over the lines following discontinuance by the Trustee.

The Trustee's actions also fall squarely within the definition of abandonment provided by the Eighth Circuit in *I.C.C.* v. *Chicago, Rock Island and Pacific Railroad Co.*, 501 F. 2d 908, 911 (8th Cir. 1974), rehearing and rehearing *en banc* den. where the court stated:

> "Abandonment, unlike an embargo, implies an intention to indefinitely or permanently cease all services."

The ruling of the lower courts herein that section 17(a) of the MRRA controls the Trustee's disposition of the debtor's assets is also consistent with ICC precedent. Under the Interstate Commerce Act, 49 U.S.C. §1010 *et seq.* applications to the ICC to abandon railroad lines are governed by 49 U.S.C. §10903, which recodified former 49 U.S.C. §1(18). Applications to acquire a rail line from another carrier are governed by 49 U.S.C. §11343 (formerly 49 U.S.C. §5(2)).

In considering applications to abandon rail lines coupled with applications by non-carriers such as the New Susquehanna to acquire the abandoned lines, the ICC has consistently held that such transactions are governed by the abandonment provisions of 49 U.S.C. §10903. As analyzed

by the Commission, Congressional purpose in enacting 49 U.S.C. §11343 and its predecessor, 49 U.S.C. §5(2), was to facilitate voluntary merger or consolidation in the national transportation system, a situation not present when a carrier is abandoning its rail lines even when said lines are proposed to be acquired by a new carrier. See, *Iowa Terminal Railroad Company Acquisition & Operation, Between Mason City & Clear Lake Iowa,* 312 ICC 546, 549 (1961); *Acquisition & Operation by Frankfort and Cincinnati Railroad,* 124 ICC 500 (1927); *Cadillac & Lake City Railway Acquisition and Operation Between Milwaukee Junction and Falmouth Michigan,* 320 ICC 617 (1964).

The ICC's treatment of abandonments and acquisition by non-carriers under section 1(18), now section 10903, was upheld by the Seventh Circuit in *People of the State of Illinois* v. *United States,* 604 F. 2d 519, 524 (7th Cir. 1979) wherein the court stated:

> "As far back as 1928, the Supreme Court recognized that Section 1(18) of the Act is applicable to obtain initial interstate operating authority by a non-carrier like Prairie Trunk. *Texas & C.R.R.* v. *Northside Ry.,* 276 U.S. 475, 479, 480, 48 S. Ct. 361, 72 L. Ed. 661, and Commission cases cited at 480-481, n.1. Accordingly, the Commission has often held that Section 1(18) governs applications by a non-carrier for authority to acquire and operate an existing line of railroad. [citations omitted]. It is immaterial whether a corresponding abandonment application for the line of track to be acquired has been filed by the existing operating carrier or has been denied. [citations omitted]. On the other hand, Section 5(2) is applicable to various purchase transactions between two or more carriers."

It has been held by the only other federal court of appeals to have ruled on the issue, that the distinction between abandonments and acquisitions by non-carriers, and sales to existing carriers was intended to and does have continuing validity under the MRRA. In *In re Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 658 F. 2d 1149 (7th Cir. 1981) the reorganization court held that section 5(a) of the MRRA, the analogous provision to section 17(a) dealing specifically with the Milwaukee Railroad reorganization, governs when a line is abanboned and acquired by a non-carrier entity. The court of appeals affirmed, holding at page 1168 of its opinion, that the abandonment and related acquisitions were properly completed under section 5(a).

In addition to relying upon congressional intent and ICC precedent in reaching its conclusion, the Seventh Circuit noted that the contrary position as advanced by RLEA would be contrary to the public interest. As noted by the court at page 1173, in language equally applicable to the case *sub judice*:

> "Furthermore, RLEA's interpretation would defeat the intent and purpose of Congress in facilitating the Milwaukee reorganization and would frustrate the primary objectives sought to be advanced within the MRRA. These objectives include expeditious and successful reorganization of the Milwaukee, preservation of essential rail service to the maximum extent possible, and avoidance of potential unemployment as well as damage to the regional and national economy. MRRA Section 2(b), 45 U.S.C. §901(b) (Supp. III 1979). The record indicates that if RLEA is correct in its view of Section 5(b)'s applicability, the acquisitions at bar would not have occurred, as the states and other non-

> carrier entities would be required to divert scarce investment and start-up funds to finance employee benefits, wage rates, and other conditions without regard to the extent the conditions are mandated by existing market conditions. If the acquiring entities are burdened with these requirements, future rail service over many of the lines, as the record reveals, would be rendered wholly unfeasible."

From the foregoing it is clear that the question of whether the Trustee's actions constituted an abandonment or a sale turns in large measure on the history of the Susquehanna reorganization proceedings, which resulted in the finding of the reorganization court that a successful reorganization was not possible, and the court's mandate to the Trustee to permanently terminate service and liquidate the debtor's assets. Review by this Court of a decision based upon the particular factual setting surrounding the reorganization proceedings of one particular Class III railroad is not appropriate since it is highly unlikely that the specific facts relied upon by the lower courts in determining that the debtor's lines should be abandoned will recur in subsequent cases.

Moreover, as pointed out above, the lower courts' determination that section 17(a) of the MRRA governed the disposition of the debtor's lines was supported by a long line of ICC precedents and was consistent with the holding of the Seventh Circuit Court of Appeals in the *Milwaukee* case *supra.*, and of this Court in *Smith* v. *Hoboken Railroad, Warehouse & Steamship Co., supra.* Thus no conflict between courts of appeals is present, and no important issues of federal law were decided by the lower courts which should be settled by this Court.

II

The determination of the lower courts that section 17(a) of the MRRA does not require the imposition of labor protection raises no special or important issues requiring resolution by this Court.

After determining that the Trustee's abandonment was governed by section 17(a) of the MRRA, the reorganization court determined that this provision does not require the imposition of labor protection. This holding, as affirmed by the Third Circuit, was based upon well-settled interpretations of analagous statutory provisions, and was consistent with congressional intent and with the holding of the only other federal court of appeals which has considered this issue.

With the enactment of section 17(a) of the MRRA, Congress transferred authority to authorize abandonments and to impose labor protection provisions in abandonment cases from the ICC to the reorganization courts. Section 17(a) provides, in part, that in authorizing any abandonment, the court shall require the carrier "to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code."

In shifting responsibility for determining whether to impose labor protection in abandonment settings to the reorganization courts, Congress intended no change in the law regarding the circumstances under which labor protection will be required. This is evident from the Conference Report accompanying section 17(a) which stated that "the Conference substitute intends to make no change in existing law as it affects employee protection." H. R. Conference Report No. 96-585 96th Cong. 1st Session (1979).

Prior to the enactment of section 17(a), the ICC, in issuing certificates of abandonment under former 49 U.S.C. §1a(4), now recodified at 49 U.S.C §10903, was required to include provisions for employee protection identical in language to that incorporated in section 17(a). Interpreting this statute, the ICC has consistently held that labor protection will not be imposed in the context of total line abandonments. See *Wellsville, Addison & Galeton Railroad Corporation—Abandonment of Entire Line,* 354 ICC 744 (1978), *Northampton and Bath Railroad Company—Abandonment,* 354 ICC 784 (1978); *Oregon Short Line Railroad and Union Pacific Railroad Company—Abandonment (Goshen Branch),* 360 ICC 666 (1980).

In enacting section 17(a) of the MRRA, which incorporated the language of section 10903, Congress is presumed to have intended that ICC precedents under section 1a(4) and section 10903 would continue to be applicable to abandonments supervised by the reorganization courts. See *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978); *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274-75 (1978).

The distinction drawn by the ICC between total abandonments and partial abandonments, mergers or consolidation has a sound policy basis. A partial abandonment provides "a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services." *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373, 378 (1942). The savings realized by an ongoing railroad permitted to abandon unprofitable lines produce economic benefits which may be shared by employees displaced by the abandonment. In similar fashion, a merger or consolidation can be expected to generate savings through cost reductions in which employees may share. In the case of a total abandonment,

however, no ongoing carrier survives to benefit from abandonment, and thus there are no savings in which employees can share.

The conclusion reached by the lower courts in the instant case, that section 17(a) does not mandate the imposition of labor protection, was also reached by the Seventh Circuit Court of Appeals, the only other federal court of appeals which has considered this question. In *In re Chicago, Rock Island & Pacific Railroad Company,* Nos. 80-1788-2199-2286 (7th Cir. Oct. 13, 1981), the court considering the proper interpretation of section 17(a) held at page 13:

> "In sum, we believe that Congress intended a perpetuation of past practice that labor protection requirements were not applicable to abandonments of whole railroads leaving no rail carrier affiliates still operating. The district court therefore properly declined to provide labor protection in connection with the total abandonment of the Rock Island."

From the foregoing, it is evident that the lower courts broke no new ground in determining that labor protection need not be imposed in the context of a total abandonment, but relied instead upon established precedent and the clear congressional intent. The conclusion reached by the lower courts is, moreover, consistent with the holding of the Seventh Circuit in the *Rock Island* decision *supra.* No unsettled issues of federal law or conflict between federal courts of appeals exist which warrant this Court's review of the decisions below.

III

The instant cases raise no constitutional uncertainty with respect to Congress' power to legislate employee protection.

The rulings of the lower courts herein that section 17(a) of the MRRA does not require imposition of employee protection provisions in cases of total abandonments was based upon an analysis of legislative intent, ICC precedent and the policy considerations underlying the ICC decisional law. No resort to constitutional principles was required to reach this conclusion.

RLEA asserts, however, that "lurking in the background are substantial constitutional issues as to whether Congress may require such aid [to railroad employees] without affronting either the Due Process clause or the Just Compensation clause of the Fifth Amendment" (RLEA's petition at page 21).

In fact, RLEA admits at page 21 of its petition, that the constitutional questions which it poses only come into play if it is determined that the lower courts in this case and in the *Rock Island* case improperly construed section 17(a). Even assuming that these constitutional issues are properly before the court on this petition, it is clear that no constitutional uncertainty exists and that the lower courts' rulings are consistent with well-established principles of constitutional law.

In directing that the Trustee cease operations, the reorganization court relied upon the holding in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920) wherein this Court established that the Fifth Amendment requires that owners of rail properties must be allowed to withdraw their property from public use when

continued operations can only be maintained at a loss. In *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 122 (1974), this Court indicated that the right to withdraw property from public use may be deferred to permit good faith efforts to develop a plan of reorganization when the public interest so requires.

Reference to the history of the Susquehanna reorganization proceeding leaves no doubt that the reorganization court correctly applied the doctrines enunciated in the above-cited cases and took no action extending their holdings. As indicated in the Counter-statement of the Case herein, the instant proceedings were commenced on January 20, 1976. The reorganization court afforded the Trustee every reasonable opportunity to effectuate a plan of reorganization by continually extending the time to file a plan of reorganization. It was not until July 2, 1979, three and one-half years after the commencement of the proceedings, that the court ordered the cessation of the debtor's operations.

The court's decision to order cessation of operations and liquidation was made after an evidentiary hearing which established that reorganization was not possible, and that the losses being sustained by the Trustee were eroding the property of the bondholders. Applying the *Brooks-Scanlon* holding the court correctly held that operations must cease.

RLEA asserts that the instant case raises a tension between the power of Congress to regulate interstate commerce and the constitutional protections of the Fifth Amendment which requires resolution by this Court. In fact, no such tension exists, since this Court has long held that the legislative authority to regulate commerce remains circumscribed by the Fifth Amendment. See, *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 589

n.19 (1935); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1927); *Monongahela Navigation Company* v. *United States,* 148 U.S. 316, 336 (1893). The power to legislate protection for adversely affected employees is obviously subject to this constitutional limitation.

The reorganization court's order directing the Trustee to commence liquidation of the debtor's property were affirmed by the Third Circuit and were not appealed to this Court. Thus no questions can be raised at this stage concerning the correction of the lower court's application of the *Brooks-Scanlon* doctrine to the facts of this case. Since by application of well-settled constitutional principles, Congress' power to legislate protection for railroad employees is limited by the Fifth Amendment, no constitutional uncertainties are raised by the holdings below which require resolution by this Court.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that none of the considerations governing review on Writ of Certiorari are present in the instant case and that this case should not be reviewed by this Court.

Respectfully submitted,

NATHAN RAVIN,
RAVIN, KATCHEN & GREENBERG, P.A.
Counsel for Respondent, Walter G. Scott, Trustee,
744 Broad Street,
Newark, New Jersey 07102.
(201) 642-1540

Dated: April 14, 1982

Appendix

APPENDIX A-1

Order for Cessation of Operations and Liquidation of Debtor Railroad

(Filed—July —, 1979)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. B-76-182

In the Matter of:

NEW YORK, SUSQUEHANNA and WESTERN RAILROAD COMPANY,

Debtor.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

This matter being opened to the Court before the Honorable Lawrence A. Whipple, Senior Judge, United States District Court, by Ravin, Katchen & Greenberg, Esqs., (Howard S. Greenberg, Esq. and Richard B. Honig, Esq., appearing), attorneys for Walter G. Scott, Trustee of the New York, Susquehanna & Western Railroad, on the return date of the Trustee's Motion for an Order extending and enlarging the time within which to file a Plan of Re-

organization and the continued return date of the Cross-Motion of Crummy, Del Deo, Dolan & Purcell, Esqs., (Michael R. Griffinger, Esq., appearing), counsel for Chemical Bank, as Trustee of the Debtor's general mortgage series A bonds, joined by United States Trust Company of New York, as Trustee of the Debtor's terminal first mortgage bonds; for an Order directing the cessation of operations and liquidation of the Debtor Railroad, or in the alternative, dismissal of the reorganization proceedings, and the following parties having been heard relative to the aforesaid Motions; Kenneth S. Levy, Deputy Attorney General of the State of New Jersey, on behalf of the New Jersey Department of Transportation; Lum, Biunno & Tompkins, Esq., (John P. Croake, Esq., appearing) attorneys for the Debtor Railroad; Jeffers, Tierney, Hopkinson & Vogel, Esqs., (Jerome A. Vogel, Esq. appearing), attorneys for Marcal Paper Co. and other shippers; Kelley, Drye & Warren, Esqs., (Edward Roberts, III, Esq., appearing) attorneys for Manufacturers Hanover Trust Co.; Rogers & Wells, Esqs., (Donald F. Luke, Esq. appearing) attorneys for the Committee of Interline Railroads; and the Court having heard and considered all of the arguments of respective counsel; and having further considered the financial report of Granet & Granet, Certified Public Accountants, and the report of L.E. Peabody & Associates, Inc., Consultants for the New Jersey Department of Transportation, and the appraisal of Martin Gross Associates, concerning the net liquidation value of the Railroad; and the Court having found that there are no foreseeable means of reorganizing the Debtor Railroad due to increasing operating deficits and financial losses and that said deficits and losses have resulted and will continue to result in an unconstitutional erosion of the bond holders' collateral in contravention of the Fifth Amendment to the Constitution

and good and sufficient cause appearing for the making and entry of the within Order;

IT IS on this day of July, 1979;

ORDERED as follows:

1. The Motion of the Trustee to extend the time within which to file a Plan of Reorganization is denied;

2. The Cross-Motion of the Indenture Trustees for dismissal of the proceedings is denied;

3. The Cross-Motion of the Indenture Trustees for cessation of operations and liquidation of the Railroad is granted; and it further

ORDERED that the Trustee shall cause the operations of the Debtor Railroad to cease within a reasonable time, and shall thereafter commence orderly liquidation of the Debtor's assets; and it is further

ORDERED, that this Court shall retain jurisdiction over liquidation of the Debtor Railroad and toward that end, Walter G. Scott shall continue as Trustee of the Debtor under the same terms and conditions as set forth in the Order of Appointment entered on March 1, 1976; and it is further

ORDERED, that Ravin, Katchen & Greenberg, Esqs., shall continue as the attorneys for the Trustee and Grant and Granet, Certified Public Accountants, shall continue as the accountants for the Trustee. The fees for both said attorneys and accountants to be fixed by further Order of this Court.

.....

HON. LAWRENCE A. WHIPPLE
Senior Judge

APPENDIX A-2

Opinion of July 12, 1979

(Filed—July 12, 1979)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J. 07101

CHAMBERS OF
LAWRENCE A. WHIPPLE
SENIOR JUDGE

July 12, 1979

To Attorneys representing all interested parties:

Re: In re New York, Susquehanna & Western Railroad Company B 76-182

ANGELO W. LOCASCIO, Clerk

Gentlemen:

On July 2, 1979 I denied the trustee's motion for an order extending the time within which to file a plan of reorganization. Furthermore cessation of the railroad's operations was ordered, as was an orderly liquidation. I believe a short written opinion is in order concerning these decisions on my part.

The New York, Susquehanna and Western Railroad Company's (hereinafter the "Susquehanna") petition for reorganization was accepted and ordered by this Court on January 20, 1976. Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. Section 77 allows for six month extensions of time to file reorganization plans; the instant

request was the eighth such extension sought by the trustee.

With each request for an extension there was increased opposition by the trustee for the railroad's general mortgage/bondholders. With each ordered extension there were more and more conditions—status reports, meetings with interested parties, conferences in chambers with the New Jersey Commissioner of Transportation, appraisals and various analyses of the railroad's operations. Finally the matter was presented to this Court of July 2, 1979, well briefed and ably argued.

At the outset we must consider the Supreme Court's caveat regarding Railroad Reorganization:

> First, the rights of the creditors must be guarded; second, the public's interest in the survival of the railroad must be respected.

In re Penn Central Trans. Co., 474 F.2d 832, 833 (3d Cir. 1973); *New Haven Inclusion Cases*, 399 U.S. 392, 431. Naturally, these two considerations can be at odds with one another. Nevertheless, it is the duty of the reorganization court to balance and weigh these two factors and arrive at a just result. As Judge Fullam stated in *In re Penn Central Trans. Co.*, 355 F.Supp. 1343, 1345 (E.D. Penn. 1973):

> The essence of § 77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a reasonable time in order to permit rehabilitation of the enterprise. Whenever it appears that there is no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.

Similarly, *In re New York, New Haven and Hartford R. Co.*, 289 F.Supp. 451, 459 (D.Conn. 1968).

In the area of unconstitutional taking of property in railroad reorganizations the leading cases are well entrenched. *See, Brooks-Scanlon Co.* v. *Railroad Comm'n.*, 251 U.S. 396 (1920); *Bullock* v. *Florida ex rel. Railroad Comm'n*, 254 U.S. 513 (1921); and *Raillroad Comm'n. of Texas* v. *Eastern Texas RR. Co.*, 264 U.S. 79 (1924). The gist of these cases is that the railroad, though devoting its property to the use of the public, does not do so irrevocably or absolutely. *Cf. Eastern Texas RR. Co., supra*, 264 U.S. at 85. The *Brooks-Scanlon* cases have been modernized to allow for interim losses in a good faith effort to develop a reorganization plan; nevertheless, the holding of the cases has remained good law. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122; *In re Penn Central Trans. Co.*, 494 F.2d 270, 278-282 (3d Cir. 1974).

The problem with the Susquehanna is that there is little or no hope of a successful reorganization. Thus I am confronted with Judge Friendly's observation:

> Neither *Brooks-Scanlon* nor the two later cases raised a question concerning another related factor present in these proceedings—the responsibility of a bankruptcy court to bring a reorganization proceeding to an end if all hope of success has faded.

In re Valuation Proceedings Under §§ 303(c) & 306, 439 F.Supp. 1351, 1364 (Special Valuation Court, 1977). The various financial statements and reports before me paint a bleak picture: revenues in 1978 down, expenses in 1978 up, increased deficit. Even the optimistic Peabody Report forecasts only $62,000 a year profit from consolida-

tion and rationalization. Unfortunately, this forecast is predicated on so many contingencies that it is more than likely that $62,000 in the black figure dissolves into a loss at the first blush of a problem. The speculative $3-5 million liquidation value must be weighed against $4.2 million of bonds payable by Susquehanna and the unliquidated administration expenses. None of which have been paid to date.

In short, continued operation of the Susquehanna erodes the collateral of the creditors and serves no significant purpose towards reorganization. There simply is no light at the end of the tunnel.

Section 77(o) of the Bankruptcy Act requires authorization and approval by the Interstate Commerce Commission (hereinafter "ICC") of any abandonment or sale of a railway under reorganization jurisdiction. In *In re Central RR. Co. of N.J.*, 485 F.2d 208 (3d Cir. *en banc* 1973) the Third Circuit held that the reorganization court could not order termination of passenger service unless approved by the ICC. They did point out however, that "our task is to apply the statute Congress has enacted [§ 77(o)] unless such statute inexorably conflicts with the constitution." *CNJ, supra,* 485 F.2d at 215.

There are two striking dissimilarities between the *CNJ* case and the Susquehanna. First, the *CNJ* involved an attempt to divest itself of the unprofitable passenger service; whereas the Susquehanna involves total cessation of operation, none of which includes passenger service. Secondly and more importantly, the unconstitutional taking has already occurred. Thus referral to the ICC will not be ordered as the continued operation during pendency before the administrative agency would be unconstitutional.

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Rather than order a dismissal pursuant to § 77(g), Bankruptcy Rule 8-310, the more sensible approach is for this Court to retain jurisdiction and order the trustee to submit a plan for orderly liquidation of the assets of the Susquehanna. This liquidation will not be done in a hasty or hurried manner, but rather, will be an orderly attempt to insure maximum values for the property of the Susquehanna.

Very truly yours,

LAWRENCE A. WHIPPLE
Senior Judge, U.S.D.C.

LAW:jaa

APPENDIX A-3

Order Denying Motions for Reconsideration of July 16, 1979 Order for Cessation of Operations and Liquidation of Debtor Railroad; and Referring Matter to Interstate Commerce Commission and New Jersey Department of Transportation

(Filed—August 24, 1979)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. B-76-182

In the Matter of:

NEW YORK, SUSQUEHANNA and WESTERN RAILROAD COMPANY,

Debtor.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

Order No. 83

This matter being opened to the Court before the Honorable Lawrenc A. Whipple, Senior Judge, United States District Court, by Kenneth S. Levy, Deputy Attorney General, of the State of New Jersey on behalf of the New Jersey Department of Transportation; Henri F. Rush, Esq., on behalf of the Interstate Commerce Commission;

Appendix A-3

Lum, Biunno & Tompkins, Esqs., (Edward R. McMahon, Esq., appearing) on behalf of the Debtor Railroad; Highsaw, Mahoney & Friedman, Esqs. (Joseph Guerreri, Jr., Esq., appearing) attorney for Railway Labor Executives' Association; Elkind & Lampson, Esqs. (Donald F. Lampson, Esq., appearing) attorneys for United Transportation Union, on the return date of said parties' respective Motions for rehearing and reconsideration of the Court's Order of July 16, 1979 (Order No. 81) for cessation of operations and liquidation of the Debtor Railroad; and the Court having heard and considered the arguments of said counsel and also counsel for the Trustee, Ravin, Katchen & Greenberg, Esqs., (Nathan Ravin, Howard S. Greenberg and Richard B. Honig, Esqs., appearing) and Crummy, Del Deo, Dolan & Purcell, Esqs., (Michael Griffinger, Esq., appearing), and Cravath, Swaine & Moore, Esqs., attorneys for Chemical Bank, as Trustee of the Debtor's General Mortgage (Series A Bonds), joined by United States Trust Company of New York, as Trustees of the Debtor's Terminal First Mortgage Bands, and Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel, Esqs., (Jerome A. Vogel, Esq., appearing) attorneys for Marcal Paper Company and other shippers; and the Court having also heard and considered the testimony of Leonard Burrell, Controller of the Railroad and Glenn L. Downing, Vice President of L. E. Peabody and Associates, Inc., special consultants to the New Jersey Department of Transportation, concerning the implementation and affect of certain economies and operational changes in the management of the Debtor Railroad; and the Court having found no factual basis upon which to reconsider, modify or vacate its July 16, 1979 Order but having determined that the matter may be properly submitted to the Interstate Commerce Commission and/or the New Jersey Department of Transpor-

tation for review and consideration, and good and sufficient cause appearing for the making and entry of the within Order,

It is on this 23 day of August, 1979;

Ordered as follows:

1. All Motions for reconsideration of the Court's July 16, 1979 Order be and are hereby denied;

2. The Trustee shall file a proposed Plan of Liquidation and application for cessation of operations and abandonment of the Debtor Railroad with the Interstate Commerce Commission, the New Jersey Department of Transportation and this Court on or before October 1, 1979;

3. The Interstate Commerce Commission and New Jersey Department of Transportation shall consider the Trustee's proposed Plan of Liquidation and application for cessation of operations and abandonment and shall submit a report and recommendation regarding same to this Court on or before December 31, 1979; and

4. Pending further Order of this Court, the Debtor Railroad shall continue normal operations.

/s/ Lawrence A. Whipple
Lawrence A. Whipple, Senior Judge

APPENDIX A-4

Opinion of August 24, 1979

(Filed—August 24, 1979)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Newark, N. J. 07101

Chambers of
Lawrence A. Whipple
Senior Judge

August 24, 1979

To Attorneys representing all interested parties

Re: In re New York, Susquehanna & Western Railroad Company B 76-182

Gentlemen:

All motions to vacate my order, ordering cessation and liquidation are denied.

This Court issued its opinion on July 12, 1979, after careful consideration and analysis of all submissions of various parties. Included within the submissions of the parties and matters considered by the Court were the Gross appraisal, the 1978 comparative financial statements for the Debtor, the Peabody report and the briefs and arguments of counsel. The Court was particularly interested in the financial data pertaining to the Debtor and the submissions of the parties with respect to the possibility of financial support for the Debtor. The only indications of financial support involved capital improve-

ments to the roadbed. No entity, public or private, came forward with any proposal for the infusion of substantial amounts of capital, operating subsidies or other feasible plan for continuation of operations on a sound financial basis.

The Court considered all these submissions quite carefully, particularly in light of the fact that substantial interests will be affected by the decision of this Court to discontinue operations of the Debtor. The Court is quite mindful of the impact of such a decision upon employees, shippers, and industry in the area in general. However, after taking all these matters into account and carefully examining the record in this case, I reached the conclusions set forth in my July 12, 1979 opinion. I believe that the conclusions contained therein are fully supported in the record and mandate the cessation of operations and commencement of an orderly liquidation of the Debtor. Implicit in my decision was the requirement that a Plan for the orderly liquidation of the Debtor be filed promptly, taking into account the interests of all parties as well as the realization of maximum asset liquidation values for the estate.

The Court has received a number of requests for rehearing and reconsideration of its decision as set forth in my July 12, 1979 opinion. I have determined that I would consider further argument and submissions by the parties so that each and every entity affected by my decision would be granted a full opportunity to be heard.

I have taken into account both the written submissions and the presentations made at the rehearing. No new facts or controlling legal authorities have been submitted

to me at the rehearing that, in my opinion, warrant reconsideration of the decision previously reached by me. The recent submissions only restate the position of some of the parties or reargue matters previously raised and taken into consideration by this Court. Accordingly, I feel there is no reason to alter my previous determination. *See*: Local Rule 12I.

The optimistic projections and hopes of some of the parties seeking reconsideration are not, in my view, grounded upon historical fact; rather they are strained efforts to envision an extraordinary reversal of an uninterrupted trend of losses and diminuation of the Debtor's estate. Such speculation is clearly outweighed by the obvious invasion of the rights of the creditors whose property is presently being consumed without compensation. Absent the possibility of a feasible Plan of Reorganization being presented to the Court, such an unconstitutional taking cannot continue. Notwithstanding the exceptions and corollaries to the *Brooks-Scanlon*[1] holding, its basis is the Constitution and its principles are still valid and controlling.

I therefore direct the Trustee to file a Plan for the cessation of operations, whether immediate or in stages, together with a Plan for the orderly liquidation of the assets of the Debtor. I direct that such Plan be filed no later than October 1, 1979.

The only remaining issue relates to the role of the ICC in the liquidation procedure I have ordered. No con-

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[1] *Brooks-Scanlon Co.* v. *Railroad Comm'n.*, 251 U.S. 396 (1920) and other authorities cited in July 12, 1979 opinion at p. 2.

trolling authority[2] has been found requiring reference to the ICC where a total abandonment or liquidation is ordered (as opposed to the abandonment of a line, a terminal, or other parts of a railroad reorganization). However, I believe a report from that body would be useful to the Court in helping to implement the cessation of operations and liquidation of the Debtor. In the last analysis, I must balance all interests, public and private, but I would value the ICC's views on the impact upon public convenience and necessity of the Plan I have directed the Trustee to file. Where, as here, an unconstitutional taking is occurring, the ICC's role may be circumscribed, but the advice nonetheless worthwhile. *See*: Legislative History to new Bankruptcy Code §1170.

Accordingly, I direct the Trustee to file a copy of his Proposed Plan of Cessation of Operation and Liquidation with ICC simultaneously with the filing in this Court on October 1, 1979. I direct that the Trustee also file with the ICC and P.U.C. of New Jersey[3] all appropriate applications and supporting documents necessary to bring

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[2] The Special Court cases relied upon by the ICC involved different factual settings and posed different issues than those this Court is forced to consider. With such differences, this Court is not bound to follow their dicta in a case such as this where losses are increasing, the estate eroding, and no hope for reorganization has been shown. Similarly, the recent decision in *In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, No. 77 B 8999 (N.D. Ill. decided June 1, 1979) by Judge McMillen annexed to the ICC's papers is inappropriate to the case at bar.

[3] It was brought to the attention of the Court that the P.U.C. has recently been merged with the New Jersey Department of Transportation, therefore the Trustee shall file with the Department of Transportation.

before the agencies the termination and abandonment of the entire operation of the Debtor.

I direct the ICC to file with this Court its determination and report on the Trustee's Plan and application no later than December 31, 1979, so that the implementation of the Plan can be considered by the Court and the parties at that time, and promptly set in motion.

Very truly yours,

LAWRENCE A. WHIPPLE
Senior Judge, U.S.D.C.

LAW:keo
cc: Attorneys representing all interested parties

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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CLERK

No. 81-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioner,

v.

WALTER G. SCOTT, Trustee of the Susquehanna & Western Railroad Company; NEW YORK SUSQUEHANNA & WESTERN RAILROAD COMPANY, Debtor; CHEMICAL BANK, UNITED STATES TRUST COMPANY OF NEW YORK, and MANUFACTURERS HANOVER TRUST COMPANY, as Indenture Trustees; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; and the NEW YORK, SUSQUEHANNA & WESTERN RAILWAY CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONER

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No. 81-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WALTER G. SCOTT, Trustee of the New York,
Susquehanna & Western Railroad Company; *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

Respondents Trustee, Indenture Trustees, New Jersey parties and debtor filed separate briefs in opposition to the petition by the Railway Labor Executives' Association [hereinafter, "RLEA"] for the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the Judgment of that court in *In re New York, Susquehanna & Western Railroad*, 3rd Cir. Nos. 81-1121 and 81-1929, decided November 16, 1981. Respondents raised several arguments in their briefs to which petitioner RLEA believes a reply should be made, and therefore, this Reply Brief is respectfully submitted in accordance with Rule 22.5 of the Rules of this Court.

I. Contrary To Respondents' Assertions, Their Distorted View Of Legislative Intent May Not Be Relied Upon In This Case To Reach A Result Contrary To The Clear And Unambiguous Language Of The Statute At Issue In This Case

Respondents echo the belief of the Seventh Circuit in *In re Chicago, Rock Island & Pac. R.*, 7th Cir. Nos. 80-1788, *et al.*, decided October 13, 1981, *pet. for cert. pending sub nom.*,

Railway Labor Executives' Assoc. v. *Gibbons*, Sup. Ct. No. 81-1805, that the plain meaning of Section 17 of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915, "is contrary to what seems so clearly to be the intent of Congress in enacting" Section 17's employee protection requirements. Sup. Ct. No. 81-1805, Pet. at 10a. Building upon that conclusion, they assert that the lower court's reliance upon their view of legislative intent to create an implied exception to Section 17's commands was entirely consistent with prior decisions of this Court delineating rules of statutory construction. Petitioner respectfully submits that respondents' arguments on this point are without merit, for they misstate the rules laid down by this Court.

Petitioner RLEA agrees with respondents that the "fundamental principle" of statutory construction is that the courts must give effect to the intention of Congress. *E.g.*, Resp. New Jersey Parties' Br. at 9. However, what respondents fail to acknowledge is that this Court has consistently stated that judicial inquiry into the intent of Congress is complete when the terms of a statute are found to be unambiguous, except in "rare and exceptional circumstances." *E.g.*, *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). Moreover, respondents fail to recognize that prior decisions of this Court clearly show that Section 17's employee protection commands do not present one of those rare and exceptional circumstances where legislative history can be used to advocate a result *contrary* to the plain meaning of a statute.

While it is correct that there is no "rule of law" which prohibits the use of legislative history as an aid to construction, it is equally beyond dispute that courts must not legislate under the guise of statutory construction. *E.g.*, *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). It is mainly because of this restriction on a court's constitutional powers that this Court has often stated that the literal meaning of a statute must be enforced except

where there is a conflict between two statutes (*e.g.*, *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976)) or where compliance with the literal meaning would lead to "absurd results." *E.g.*, *Crooks* v. *Harrelson*, 282 U.S. 55, 59-60 (1930). Obviously, the first exception does not aid respondents, and when the second exception is examined, it is apparent that it also is of no help to respondents. As this court has stated:

> [T]o justify a departure from the letter of the law upon that ground [*i.e.*, absurd result], the absurdity must be so gross as to shock the general moral or common sense. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.

Crooks v. *Harrelson*, *supra*, 282 U.S. at 60.

Even though respondents Indenture Trustees refuse to concede the obvious (Resp. Indenture Trustees' Br. at 9), Congress used clear and unambiguous terms to command that in "authorizing *any abandonment*" or in "authorizing *any . . . sale or transfer*" pursuant to Section 17, "*the court shall provide* a fair arrangement" to protect the interests of employees. 45 U.S.C. §§ 915(a) and (b)(1) (emphasis added). The meaning of the italicized terms is plain and does not require a reference to other legislation to obtain their import as the Indenture Trustees' suggest. Also, the enforcement of their literal meaning cannot be said to lead to results which shock the general moral or common sense since this Court has long recognized that employee protective provisions serve a strong public purpose. *E.g.*, *ICC* v. *Railway Labor Executives' Assoc.*, 315 U.S. 373 (1942); *United States* v. *Lowden*, 308 U.S. 225 (1939). Also, the ICC has previously stated that:

> Although we have not generally imposed such conditions in cases involving abandonment of an entire line of railroad, there is no statutory prohibition on our doing so and, where circumstances make such action reasonable and in the public interest, it is our duty to afford protection to

> employees who may be adversely affected by such an abandonment.

Seaboard Air Line R.—Trackage Rights, 312 I.C.C. 797, 800 (1962). And finally, it must be remembered that the ultimate choice as to what the public interest requires in railroad reorganizations is for Congress, and not for the courts to make. *Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943).

A second fallacy of respondents' argument on this point is that the legislative history of the MRRA does not support their conclusion that Congress intended to create an exception to the employee protection requirements of Section 17 of that Act. A review of the congressional debates which led to the passage of the MRRA in 1979 will show, petitioner submits, that the entire line abandonment issue was not discussed. Also, the Conference Report to that legislation does not specifically address this issue. *See*, H. Rpt. No. 96-583, 96th Cong, 1st Sess. (1979). Respondents, on the other hand, have been able to point to only one set of statements in the MRRA's legislative history which they claim supports their construction of the statute (*i.e.*, those statements in the Conference Report that both Sections 5 and 17 of the MRRA, 45 U.S.C. §§ 904, 915, were not intended to change existing law as it affects employee protection, H. Rpt. No. 96-583, *supra*, at 17, 27), but even those statements are ambiguous and do not specifically refer to this issue. While there are references by Members of Congress to this question, those references all occurred after the MRRA had been enacted, and even then, Congress was of the belief that it had earlier required employee protection under Section 17 in an entire line abandonment case -- *i.e.*, the Rock Island Liquidation.[1] *E.g.*, H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 21 (1980).

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[1] Some members of Congress, including those active in the legislation, expressed the view that the MRRA did not require employee protection in entire line abandonments of small railroads (*see*, Pet. at 26a-27a), but the language of the statute is silent on the criteria they believed should be used to draw such an exception.

To buttress their argument, respondents assert that it "was well established" in 1979 that employee protection was not required in an entire line abandonment situation (*e.g.*, Resp. New Jersey Parties' Br. at 10), and that the courts were required to follow that "law" in construing Section 17. Contrary to respondents' belief, however, the law was not as clear on this issue as respondents insist.

In 1976, Congress modified the ICC's discretion and made employee protection mandatory in abandonment cases. *See*, Pet. at 18. While the Commission asserted in 1978 that the 1976 amendment did not change its prior practice on this subject, that rejection of the plain language of what is now 49 U.S.C. § 10903(b)(2) was never tested in court and is still challenged. *See*, *McGinness* v. *ICC*, 662 F.2d 853, 860 n.25 (D.C. Cir. 1981). When Congress passed the MRRA and imposed the same mandatory employee protection requirement that it had enacted for abandonments in 1976, it used language that was different, but just as explicit as the language it had used in 1976 to require employee protection in "each" abandonment case. *Compare*, 45 U.S.C. § 915(a), *with*, 49 U.S.C. § 10903(b)(2).

Surely, it requires more than the ambiguous statement relied upon by the courts below and by respondents to create an exception by judicial construction to the clear language used by Congress in this case. *Accord*, *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). It was the very absence of such an express statement in the MRRA which led the General Counsel of the ICC to inform Congress in February 1980 that regardless of whether the Commission has discretion to decline to impose employee protection upon entire system abandonments, the reorganization courts under Section 17(a) of the MRRA are obligated to impose employee protections when they authorize an abandonment of an entire line. Letter of ICC General Counsel to Sen. Nancy L. Kassebaum, H. Rpt. No.

96-839, *supra*, at 63, 66 (reproduced herein as Appendix I at 67a, 72a).

Petitioner RLEA respectfully submits that it was only by ignoring prior decisions of this Court on the proper manner in which to interpret statutes that the courts below were able to judicially legislate an exception to the plain language of Section 17 of the MRRA. Contrary to respondents' assertions, this Court should accept review of this case, both because of this Court's supervisory powers over lower federal courts, and because of the separation of powers requirement that the federal courts enforce the public policy as expressed by Congress in its statutes. *TVA* v. *Hill*, *supra*, 437 U.S. at 194-95.

II. This Case, As Several Respondents Asserted Below, Presents In A Justiciable Manner Important Constitutional Questions As To The Power Of Congress To Require A Liquidating Railroad To Aid Its Employees

Respondents argue that this case does not present constitutional issues which are ripe for review because the lower courts' decisions can be sustained on non-constitutional grounds. But in making such arguments, respondents assume that the courts below correctly decided that the clear, unambiguous, and mandatory language of Section 17's employee protective provisions could be construed as being permissive, and they ignore the constitutional issue which will be presented if this Court concludes that there is no implied exception to Section 17's plain language. Petitioner respectfully submits that the fact that the need to address the constitutional issue raised by petitioner is contingent, does not render that question non-justiciable; once the statutory construction argument of respondents is rejected, the constitutional issue is then presented in a "clean-cut and concrete form." *Compare, Regional Rail Reorganization Act Cases*, 419 U.S. 102, 145-46 (1974),

with, Rescue Army v. *Municipal Court*, 331 U.S. 549, 584 (1947).[2]

Even though respondents now assert that the constitutional issue is neither substantial nor ripe for review, several respondents took a different position before the lower courts. For example, the New Jersey Parties argued in their brief to the court of appeals that to require creditors of this bankrupt railroad "to witness a further reduction of their limited collateral is unacceptable if not unconstitutional." New Jersey Parties' Br. at 20. Respondents Indenture Trustees asserted to that appellate court that such a requirement would "have grave constitutional implications" (Indenture Trustees' Br. at 35), and respondent Trustee used several pages of his appellate brief (Trustee's Br. at 34-36) to advocate that : "To impose labor protection conditions on the Trustee's Plan of Liquidation would . . . violate the constitutionally protected right of the creditors to withdraw the property from public use and would itself be unconstitutional." *Id.* at 34. Respondents have not pointed to any intervening circumstance which would justify their disavowal of their earlier arguments. Moreover, those assertions have a strong basis in the lower courts' decisions since the reorganization court expressly relied upon the debtor's constitutional right to withdraw from rail operations in concluding that employee protection was not warranted in this case. Petition at 25a.

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[2] Respondents New Jersey parties assert that the constitutional issue presented herein is not ripe for an additional reason, namely, that the priority of such payments must first be determined before the constitutional question is justiciable. Petitioner RLEA disagrees since the constitutional issue is inextricably intertwined with the priority question. Employee protective benefits, to be effective, must be paid as the need for such protection arises. Such benefits can be deferred only if it is determined that those payments would otherwise constitute an uncompensated taking of private property for public purpose.

Respondents also assert that the constitutional question presented by this petition is not substantial because, as respondent Trustee explained, "Congress' power to legislate protection for railroad employees is limited by the Fifth Amendment, [and thus,] no constitutional uncertainties are raised by the holdings below which require resolution by this Court." Resp. Trustee's Br. at 23. That contention, petitioner RLEA respectfully submits, is, to say the least, totally devoid of merit. The conflict between the power of Congress to regulate commerce and the right of creditors and investors to withdraw from a losing venture is not a novel issue, but it is also not subject to clear answers. This conflict and its resolution are now even less clear when the commerce regulation at issue is the protection of employees. *See*, Appendix I at 67a-69a. This Court's recent consideration of this issue in *Railway Labor Executives' Assoc.* v. *Gibbons*, Sup. Ct. Nos. 80-415 and 80-1239, decided March 2, 1982, clearly establishes the degree of uncertainty which presently exists over Congress' ability to require a liquidating railroad to aid its employees. Because of the importance of this issue to Congress' ability to regulate commerce as it deems best (*e.g.*, H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138-39 (1980)), it is beyond question, petitioner submits, that this case presents substantial constitutional issues.

III. The Decision By The Courts Below To Treat The Transaction At Bar As Being An Abandonment Rather Than A Sale Or Transfer For Continued Rail Usage Does Not Present A Question Of Fact

Respondents assert that this Court should not accept for review the question posed by petitioner RLEA as to whether the sale of the debtor's rail properties was a transaction governed by Section 17(b) of the MRRA, 45 U.S.C. § 915(b), because that issue is basically one of fact and was decided in a manner consistent with a long line of prior ICC decisions. *E.g.*, Resp. Trustee's Br. at 17. Petitioner RLEA disagrees because the fundamental difference between RLEA's position and that adopted by the courts below is one of statutory construction.

Respondents and the courts below contend that Section 17(a) tracks the abandonment provisions of the Interstate Commerce Act, 49 U.S.C. § 10903, while Section 17(b) covers only those transactions governed by the consolidation provisions of the Interstate Commerce Act, 49 U.S.C. § 11343, *et seq.* Under that interpretation, sales to newly formed carriers, such as the New York, Susquehanna & Western Railway Corporation, are treated as abandonments under Section 17(a) of the MRRA, and as acquisitions under 49 U.S.C. § 10901. Because such acquisitions are under the Interstate Commerce Act, and not the MRRA, the reorganization court has no control over that aspect of that transaction.

Petitioner RLEA, however, asserts that when Congress enacted the MRRA and used the introductory language of "Notwithstanding any other provision of law" beginning both Sections 17(a) and 17(b), Congress intended to give the reorganization courts control over all abandonments, and all sales or transfers for continued rail operations. According to RLEA, prior ICC treatment of such transactions was irrelevant because Congress rejected a version of the Act which would have limited Section 17(b) to transactions within the scope of the consolidation provisions of the Interstate Commerce Act (*see*, H. Rpt. No. 96-583, *supra*, at 16-17, 27), and instead tracked the Bankruptcy Code's revisions to former Section 77(o) of the Bankruptcy Act. *Compare*, 11 U.S.C. § 205(o) (repealed), *with*, 11 U.S.C. §§ 1170, 1172(b), *and*, 5 Collier on Bankruptcy ¶ 1172.03 n.3 (15th ed. 1981).[3]

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[3] Respondents Indenture Trustees assert that RLEA previously argued that the transaction at bar was an abandonment, and therefore is estopped from taking a different position before this Court. Resp. Indenture Trustees' Br. at 12. That position is incorrect, for when RLEA argued that the transaction was governed by Section 17(a), the Trustee had not been authorized to sell the debtor's rail property. Once the sale was approved, RLEA asserted that Section 17(b) governed.

It is this disputed question of statutory construction which is at issue. Consequently, prior cases defining an abandonment under the Interstate Commerce Act, or detailing the manner in which the ICC treated similar transactions under that act, are thus irrelevant.

CONCLUSION

For the reasons stated herein and previously stated, petitioner RLEA respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Third Circuit.

Respectfully submitted,

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Dated: May 18, 1982

Appendix

APPENDIX I

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., February 26, 1980.

Re: Liability of Rock Island Estate for Employee Protection
Hon. NANCY L. KASSEBAUM,
U.S. Senate, Washington, D.C.

DEAR SENATOR KASSEBAUM: This responds to your request at the hearing on February 20, 1980 for amplification of my opinion that the Estate of the Rock Island Railroad is liable for employee protection in connection with liquidation proceedings.

My opinion is based primarily on two decisions of the courts in deciding upon the value to be placed on assets of bankrupt railroads required to be transferred. In the first such decision a three-judge district court, in affirming the Commission's valuation of the rail properties of the bankrupt New Haven Railroad required by the Commission to be included in the merged Penn Central, held:

> When the case was last before us, we indicated tentative agreement with that position. We cited authorities which established in our view that a railroad with no reasonable hope of future earnings, such as NH, had a constitutional right * * * to cease operations and liquidate," [*sic*] 289 F.Supp. 440, since to force operation at a loss "would be to take its property without the just compensation which is a part of due process of law." *Railroad Commission of State of Texas* v. *Eastern Texas R.R.*, 264 U.S. 79, 85 44, S. Ct. 247, 249, 68 L.Ed. 569 (1924); *Bullock* v. *State of Florida ex rel. Railroad Commission*, 254 U.S. 513, 41 S. Ct. 193, 65 L.Ed. 380 (1921); *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 40 S. Ct. 183, 64 L.Ed. 323 (1920). Despite observations in the Commission's report, 334 I.C.C. at 55-57, we adhere to that view, for reasons fully developed in the recent opinion of the reorganization court, subject only to the qualification that liquidation of NH could not commence until the Commission, acting with appropriate speed under § 1(18) of the Interstate Commerce Act, had issued the certificate of abandonment to which NH would have been constitutionally entitled. We believe this position is also supported by two opinions of Mr. Justice Brandeis which we read as declaring that while Congress may in the public interest subject a

> secured creditor to reasonable delays in realizing on his security, it may not deprive him altogether of his right to sell the rest at public auction. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 55 St. [*sic*] Ct. 854, 79 L.Ed. 1593 (1935); *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 57 S. Ct. 556, 81 L.Ed. 736 (1937).

New York, N.H. & H.R.R. Co., First Mortgage 4% Bond Holders' Committee v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969). This holding was at least tacitly approved by the Supreme Court's observation in the *New Haven Inclusion Cases*, 399 U.S. 392 at 461, that "no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1(18) of the Interstate Commerce Act."

The second decision is the decision of the Special Court under the Regional Rail Reorganization Act concerning the values to be assigned properties transferred to Con Rail under the Act. *In the Matter of Valuation Proceedings Under §§ 303(e) and 306 of the Regional Rail Reorganization Act*, 439 F.Supp. 1351 (1977). In addressing the question of whether erosion for operations continued by the various estates during the period prior to conveyance of property to Con Rail should be compensable, the court stated (439 F.Supp. at 1370-71):

> A third proposition is that § 1(18) does not cease to be applicable merely because serious erosion of the property of railroad is taking place. As indicated, the railroads in Brooks-Scanlon, Bullock, and Eastern Texas had been through all administrative processes that were required. Despite the desperate situation of the New Haven which had experienced net operating losses for four and a half years before invoking § 77, see *New York, New Haven, and Hartford Railroad Discontinuance of Trains*, 327 I.C.C. 151, 166 (1966), and by 1963 had no prospect for a successful reorganization on the basis of capitalized earnings, see *In re New York, New Haven and Hartford Railroad*, 289 F.Supp. 451, 456 (D.Conn. 1968), Judge Anderson considered that authorization to abandon would have had to be obtained from the Interstate Commerce Commission, *In re New York, New Haven and Hartford Railroad*, 304 F.Supp. at 801; as shown above, the Supreme Court rejected the

> Commission's proposal to take account of an additional year to obtain such authority not because it thought that this was not needed, but because Judge Anderson had already taken into account a reasonable period for obtaining it. 399 U.S. at 463, 90 S. Ct. 2054. Again, as noted in Section III of this opinion, our own decision on the 180-day Appeals held that the Brooks-Scanlon principle had been qualified by requiring compliance with reasonable requirements for administrative approval; perhaps it would have been more accurate to say that the Brooks-Scanlon doctrine needed no such qualification since the administrative process had been exhausted in that case and its two early companions. See also *New York, New Haven and Hartford Railroad First Mortgage 4% Bondholders' Committee* v. *United States*, 305 F.Supp. at 1055; *In re Central Railroad of New Jersey*, 485 F.2d at 215. The validity of this third proposition is in no way impaired by decision, stemming from the *Third Avenue Transit* case, supra, 198 F.2d 703, that a reorganization court cannot properly impair liens by such measures as approving the issuance of trustees' or receivers' certificates or authorizing use of the proceeds of sale of mortgaged properties for operations when the prospect of successful reorganization has disappeared, but instead must direct a trustee to apply for abandonment.

See also *id.* at 1366-67 wherein the Court analyzes the import of the *New Haven* decision cited above.

The above decisions appear to indicate that a certificate of abandonment must be obtained before liquidation can commence. The question then becomes whether the Commission or the court overseeing the reorganization of the Rock Island should, or must, impose labor protective conditions upon its grant of the certificate. [1] Although the matter is not entirely free from doubt, I am inclined to the view that the reorganization court is obligated to impose employee protective conditions upon its grant of a certificate authorizing abandonment. Of course, the priority which the court affords claims for payments under these conditions will to a large extent determine the value of the conditions to the affected employees.

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[1] Section 17(a) of the recently enacted Milwaukee Railroad Restructuring Act (P.L. 96-101) (MRRA) transfers ultimate responsibility for authorizing abandonments from the Commission to the courts overseeing the reorganization of railroads in reorganization at the date of its enactment other than the Milwaukee.

Prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), it was settled law that the Commission had broad discretion to determine whether and to what extent labor protective conditions should be included in certificates authorizing abandonment. The Commission customarily, but not always, imposed the so-called Burlington employee protective conditions, which afforded substantially less protection to affected employees than those imposed upon certificates authorizing mergers under former Section 5(2). The *Tennessee Central* case,[2] referred to at the hearing, was one of a number of cases in which the Commission refused to impose employee protection upon abandonment of an entire railroad system. The explanation given by the Commission for refusing to impose employee protective conditions in all of these cases was that it would be inequitable and unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations (333 I.C.C. at 454).

With the enactment of the abandonment provisions of the 4R Act, Commission discretion with respect to the imposition of labor protection on certificates authorizing abandonment was apparently eliminated. Section 1a(4) of the Interstate Commerce Act, as added by the 4R Act, provides:[1]

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

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[2] [*sic*] *Tennessee Central Ry. Co., Abandonment*, 333 I.C.C. 443, 454 (1968), 334 I.C.C. 235, 244-46 (1969).

[1] As recodified at 49 U.S.C. 10903(b)(2), that provision now reads:

> Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

In considering the effect of that provision in an entire system abandonment proceeding following enactment of the 4R Act,[4] the Commission acknowledged that "The precise language of Section 1a(4) of the Act would appear to require imposition of employee protective conditions in all permitted abandonments" (354 I.C.C. at 745) at the same time relying on the statement in the legislative history (H.R. Rep. No. 94-781, 94th Cong., 2d Sess., p. 218) that what ultimately became Section 1a(4) was not intended to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad. The Commission concluded that it had discretion not to impose employee protection and, adhering to its prior line of decisions on the subject, it declined to do so. This decision was subsequently followed by a decision of the Commission in a proceeding entitled *Northampton & Bath R.R. Co. — Abandonment*, 354 I.C.C. 784 (1978). Neither of these decisions were appealed to the courts and the time for doing so has long since expired. Accordingly, it must be accepted that the Commission in those cases believed it had discretion not to impose labor protective conditions on entire system abandonments.

However, as indicated, supra, n. 1, Section 17(a)(1) [*sic*] transfers ultimate responsibility for authorizing abandonments by the Rock Island from the Commission to the Court overseeing its reorganization. That section expressly provides that:

> in [*sic*] authorizing any abandonment pursuant to this section the Court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code.

The conditions developed by the Commission under that section were upheld on review in *New York Dock Railway* v. *United States*, 609 F.2d 83 (2d Cir. 1979) as the minimum level of employee protection required by amendments to former Section 5(2) enacted as a part of

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[4] *Wellsville Addison & Galeton R.R. Corp. — Abandonment*, 345 I.C.C. 744 (1978).

the 4R Act. Thus there would appear to be no doubt as to the level of protection required to be afforded employees, if abandonment is a necessary precondition to liquidation, as I believe it is. Also, there is no legislative history associated with the MRRA comparable to that relied on by the Commission in holding it had discretion under the 4R Act not to impose employee protective conditions on entire system abandonments.

For the foregoing reasons, I am of the view that, regardless of whether the Commission has discretion to decline to impose employee protection upon entire system abandonments, the reorganization court is obligated to impose the so-called New York Dock conditions upon its approval. The value of those conditions will, however, be directly related to the priority the court assigns to employee claims thereunder.

Sincerely yours,

RICHARD A. ALLEN,
General Counsel.